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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

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Addendum

INTERPRETATIONS OF INTERNATIONAL FAIR TRIAL NORMS BY THE INTER-AMERICAN COMMISSION ON AND COURT OF HUMAN RIGHTS

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Introduction

1. The Inter-American Commission on Human Rights has interpreted the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, elaborating the rights necessary for a fair trial.

2. The Inter-American Court of Human Rights, through its adjudicatory and advisory jurisdiction, has also examined violations of human rights related to a fair trial, albeit in only a few cases.

3. Although the Inter-American Commission has considered many cases and country situations alleging violations of rights in the trial process, the Commission's reports and decisions do not provide a large number of specific rules or detailed decisions on the right to a fair trial. Often, the situation in which the cases arise places the Commission in the position of "reminding" various Governments that individuals have the right to a fair trial. The Commission infrequently has the opportunity to identify aspects of the right which has been violated. Instead, the Commission usually deals with cases where no trial at all has been granted to an individual.

4. Of the cases reported in the Commission's annual reports, only a small number, mostly from Jamaica, have afforded the Commission the luxury of looking at the judicial process of the country cited by the petitioner. 500/ In the Jamaican cases, the petitioner was represented by counsel and the transcripts of the court proceedings were supplied upon request to the Commission. In these cases, the Commission generally found that the Jamaicans had received a fair trial. These decisions demonstrate the Commission's willingness to look at a country's judicial system, if the situation allows. These decisions also indicate the Commission's endorsement of systems where court records are kept and available, petitioners are represented by counsel, etc. If a fair judicial system is in place, then the Commission appears rarely to find against the existing judicial system.

5. The following are brief summaries of a sample of the cases in which the Commission resolved that the right to a fair trial was violated. Some of the Commission resolutions concerning the right to a fair trial are found to be violations of either (and sometimes both) article XVIII (Right to a fair trial), and article XXVI (Right to due process of law) of the American Declaration of Rights and Duties of Man. 501/ Others cite the American Convention on Human Rights, article 8, Right to a fair trial and article 25, Right to judicial protection. 502/

6. In Case 1757 (Bolivia) (June 1974), 503/ a number of citizens were detained without trial. The Bolivian Government admitted to having a number of the people in custody, viewing them as extremists. The Government stated that the people were being held pending investigations of the charges and did not view the incarceration as repression. The Commission found, among other violations, the violation of the right to a fair trial and the right to due process under the American Declaration.

7. In Cases 1758, 1759, 1762, and 1763 (Paraguay) (June 1973), 504/ people who were arrested and detained without being informed of charges were not given trials. Some had been imprisoned for as long as 13 years at the time of the complaint to the Commission. Among the violations the Commission found were the violation of the right to a fair trial and the right to due process under the American Declaration.

8. In Case 1783 (Uruguay) (January 1978), 505/ a young university student died while in the custody of the Uruguayan armed forces. The autopsy showed signs of torture and the young man had died from wounds suffered during his detention. During its investigation, the Government of Uruguay ordered another autopsy. The examining magistrate who had jurisdiction to investigate found both autopsies to be flawed and found it impossible to make any definitive judgement concerning the death of the student. The Commission found that although judicial processes had been exhausted, the Government still had an obligation to conduct a thorough and impartial investigation and to punish those responsible. Among the rights violated were the right to a fair trial and the right to due process under the American Declaration.

9. In Case 1944 (Haiti) (May 1977), 506/ the Commission received a complaint that 74 individuals had been held - many for several years - in detention without trial. The Haitian Government responded that much of the information, including the names of the detainees, was falsified and that the Commission should more fully investigate allegations before bringing them before Governments. The Commission noted that the Government had provided information on only one of the named 74 prisoners. The Government was found in violation of a number of rights, including the right to a fair trial and the right to due process under the American Declaration.

10. In Case 2088 (Argentina) (November 1978), 507/ the kidnapping of a former senator was denounced in a petition to the Commission. In its communication to the Government, the Commission pointed out that it appeared the senator had been kidnapped and later detained without charge due to the state of siege. The communication also stated that he was about to be called before the courts of the nation. In fact, the Government, after holding him for nine months, expelled the senator. The Commission found the right to a fair trial under the American Declaration among the rights violated.

11. In Case 2126 (Chile) (June 1978), 508/ a chemist was detained by members of DINA, the National Intelligence Bureau, who were assisted by carabineros. In reply to a writ of amparo, the courts were informed by DINA that there were no records of the detention. The Government failed to provide any information concerning the detention of the missing man. The Commission resolved that among the violations were the violation of the right to a fair trial and the right to due process under the American Declaration.

12. In Case 2299 (Cuba) (June 1981), 509/ a Cuban citizen was arrested and sentenced to 15 years in prison without benefit of a trial. He was imprisoned for eight years during which time he was tortured. He spent two more years in a work camp before he was released. He was later rearrested and imprisoned

although he had not committed any crime. The Cuban Government failed to answer the inquiries of the Commission. The Commission resolved that among the violations were the violation of the right to a fair trial under the American Declaration.

13. In Case 9038 (Guatemala) (October 1984), 510/ courts of special jurisdiction sentenced a number of people to death by firing squad. The Commission cited the lack of guarantees to the individuals who were executed. It found the courts had violated the provisions established by the American Convention due to their lack of independence, impartiality and discretion as well as by failing to uphold the universally accepted rules of due process. The innumerable procedural defects in the court procedures included a lack of necessary independence and impartiality essential to an organ in charge of administering justice; the refusal to grant the defendants, in the course of their trials, adequate means to prepare their defence; denial of the right to communicate freely and privately with counsel and to interrogate witnesses or experts; and, in many cases, compelling the defendants to declare themselves guilty and incriminate themselves. They were also denied the right to appeal, at least in the first trials, and were refused the right to a public trial. On the contrary, the trials were secret.

14. In Case 9265 (Suriname) (July 1985), 511/ the military police arrested 10 people who were accused of plotting a coup d'état. Refugees from Suriname reported that the prisoners were tortured and that some had died while in custody. The Surinamese Government did not address the accusations of torture in their answer to the Commission. The allegations were denied orally by government officials in interviews conducted during an on-site visit. In the view of the Government, the prevailing state of siege in the country justified the arrests. The Commission found, however, that the decree laws in force prima facie violated the non-derogable right to due process. The Commission cited the violation of the right to due process among the violations by the Government of Suriname. The Commission denied the request by the Government for redetermination in October 1985.

15. In Case 9619 (Honduras) (March 1987), 512/ an attack by the Honduran army against Salvadorian refugees resulted in two deaths (including a baby), 50 wounded, 15 apprehended, 2 women raped and 7 tortured. The Commission found that the Honduran Government had failed to respond adequately to the Commission's inquiries. The Commission stated that the situation, safety and integrity of the refugees was the responsibility of the Honduran Government. The Commission found among the violations the right to due process under the American Convention.

16. Some cases, special country reports and yearly country reports of the Commission as well as decisions of the Inter-American Court provide more detailed analysis of fair trial rights. The Commission's and the Court's interpretation of the rights associated with the fair trial provisions contained in the American Convention and the American Declaration are examined below.

I. ARREST AND DETENTION

17. The American Convention on Human Rights [hereinafter American Convention] contained several provisions guaranteeing individuals specific rights in the trial process. Article 7 (1) of the Convention guarantees every person the right to personal liberty and security. Articles 7 (2) and 7 (3) prohibit unlawful and arbitrary arrest and imprisonment. Under article 7 (5), a detainee must be brought promptly before a judge or officer authorized to exercise judicial authority and is entitled to a trial within a reasonable time. Article 7 (6) guarantees the detainee the right to have a competent court decide without delay on the lawfulness of the arrest or detention and order release if the arrest or detention is unlawful.

18. The American Declaration of the Rights and Duties of Man [hereinafter American Declaration]also sets forth several rights in the trial process. Article XVIII provides every person with the right to resort to the courts to ensure respect for his legal rights. Article XXV guarantees that any person deprived of liberty has the right to have the legality of the detention promptly reviewed by a court. Article XXV also prohibits detention except according to procedures established by pre-existing law. Under article XXV no person may be deprived of liberty for non-fulfilment of a purely civil obligation.

A. Prompt review of detention

19. The Commission has apparently not defined the precise period which would qualify as a "prompt" review of a person's loss of liberty. The Commission called a five-day delay in responding to a habeas corpus writ "very long". 513/ It also found a law authorizing a 15-day detention without judicial review to be a violation of a detainee's rights. Under that law an order for provisional detention could be obtained solely on the basis of evidence presented by public security bodies. 514/ The law allowed public security bodies 15 days to investigate the case of a detainee. Since it was not required that a judge check the evidence supporting the provisional order, the detainee could be held for 15 days without judicial review; this procedure was found to violate the detainee's right to prompt review. 515/

20. The Commission prohibits indefinite pre-trial detention. The Commission has held that failing to set a timelimit for the release of a prisoner held without charges or for annoucing the nature of the accusations violates the detainee's rights. 516/ In addition, if the time a detainee is held before trial exceeds the period he or she would serve if convicted and sentenced, the detention is a serious violation of the detainee's right to be charged and convicted before being punished. 517/

B. Authority of the courts over detainees

21. The right to due process applies equally to all segments of the population. Vesting military officials in Nicaragua with the authority to detain Miskitos "without following legal formalities and without allowing any judicial remedy" constitutes a flagrant violation of the Miskitos' due process rights. 518/

22. The courts must be able to exercise control over detention and to require authorities detaining an individual to obey decisions to release a detainee. Failure to release a prisoner after a writ of dismissal has been issued constitutes an illegal detention. 519/

23. The court must be promptly informed of persons being held in detention. One purpose of judicial control of detention is to safeguard the well-being of the detainee and prevent any violation of his/her fundamental rights. The Commission found that if the court is not informed of the detention or is informed after a significant delay following the date of the arrest, the rights of the detainee are not protected and the detention violates the detainee's right to due process. 520/

24. Failure to recognize "the obligation to submit the detained person to a judge" or to recognize "a timelimit for the release of a prisoner without charges, for annoucing the nature of the accusations, for notifying the family of the arrest or informing them of the place of detention" violates the detainee's right to judicial guarantees. 521/

25. The Commission encouraged Governments to take three steps to ensure judicial control of detainees. First, it called on Governments to establish a central registry containing a record of all persons who have been subject to imprisonment. Second, it urged Governments to ensure that detention is administered exclusively by competent and duly identified authorities. Third, it requested that detainees be kept in custody in places established for such purpose. 522/

26. The names and whereabouts of all detainees should be made known to the court and to their families. Failure to release the whereabouts of a detainee is an obstruction of justice which prejudices the detainee's right to legal guarantees. 523/ The Commission welcomed the Guatemalan Government's efforts to ensure that the name of anyone detained in Guatemala, regardless of the arresting authority, was reported to a Detainee Control Registry. The Registry replaced a previous recording system which registered only persons turned over to the courts and not those detained by police, security, or armed forces. 524/

27. The Commission noted that the family of the detainee must receive timely notice of the arrest and place of detention. 525/

28. An authority who makes an arrest "without such constitutional requisites as a warrant from a competent authority and formulation of charges being fulfilled" seriously infringes the individual's right to legal guarantees. 526/ Issuing an arrest warrant after an individual has been detained does not remedy the violation of the individual's due process rights. 527/

29. The arrest of a person by paramilitary groups or security forces in civilian dress who present neither the appropriate identification nor an arrest warrant issued by the competent authorities constitutes an arbitrary arrest and violates the individual's due process rights. 528/

30. Places used for detention should not only be identified as such but should meet certain minimal requirements which every prison should satisfy. 529/

C. Right to habeas corpus/amparo

31. The Commission has urged that at all times the judiciary should have the power to intervene to stop executive action resulting in arbitrary detention. 530/ The Commission maintains that through amparo and habeas corpus proceedings the judiciary should be able to review the decisions of the executive branch as to the reasonableness of an arrest. 531/

32. The Commission found that a law empowering the President to order an arrest and detain an individual for an extended period without the right to habeas corpus or review by a court, violates the detainee's right to due process. 532/

33. The right to habeas corpus is jeopardized when the court denies the petition on the basis that the person's whereabouts are unknown. The Commission welcomed a Guatemalan measure to ensure the effectiveness of habeas corpus proceedings when the person's whereabouts were unknown. The Government instructed judges who denied petitions for habeas corpus on the ground that the person was missing to initiate an immediate investigation of the disappearance to determine the whereabouts of the missing person. 533/ Prior to implementation of the new measure a judge would close the case when a petition for habeas corpus was denied because the person was presumed missing, could not be located or was not found in detention.

34. The State must permit appeal of a petition for habeas corpus. During a state of siege the Supreme Court of Paraguay disqualified itself from hearing writs of habeas corpus. The Commission found that if the Supreme Court abdicated its power to review the petitions, the right to habeas corpus was violated. 534/

D. Non-derogability of the right to habeas corpus

35. The Inter-American Court, in an advisory opinion, held that habeas corpus is a non-derogable right under article 27 (2) of the American Convention. 535/

36. Suspension of the habeas corpus remedy, "the only legal mechanism to prevent incommunicado imprisonment" infringes a detainee's right to judicial guarantees. 537/* The Commission found that it is a serious violation of an individual's right to remedies for deprivation of liberty when an individual is denied the right of habeas corpus during a State's exercise of special or, exceptional powers, or during a state of siege. 538/

37. The Commission affirmed Nicaragua's recognition of habeas corpus as non-derogable during a state of emergency. It declared, however, that habeas corpus must be available to detainees irrespective of the lawfulness of the arrest. The Nicaraguan law associated habeas corpus petitions with "unlawful arrest" and "illegal detention". The Commission found that in order to protect the personal safety of the individual, a petition for habeas corpus must be allowed whether or not the person is unlawfully arrested or detained. 539/

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* Note 536 has been deleted for technical reasons.

E. Immediate right to counsel

38. The accused must be allowed to obtain legal counsel when first detained. The Commission examined a law allowing a detainee to appoint a lawyer only after the court had granted a provisional arrest order. The law meant that a detainee could not have counsel during the period of administrative arrest and investigation. The Commission noted that decisive evidence may be produced during this initial period and held that the lack of legal advice during this first part of the trial could seriously impinge upon the right to defence. 540/ In addition, ensuring access to an attorney prevents possible abuse of other fundamental human rights.

39. The Commission noted that incommunicado detention "is not in keeping with the constitutional guarantees or the standards with respect to human rights". The situation "creates an atmosphere conducive to other illegal practices, particularly torture ...". 541/

II. TREATMENT DURING PRE-TRIAL DETENTION AND IMPRISONMENT

40. Article 5 (1) and 5 (2) of the American Convention on Human Rights guarantee respect for the physical, mental and moral integrity of the person and prohibits torture or cruel, inhuman or degrading punishment or treatment.

41. Article XXV of the American Declaration guarantees every person the right to humane treatment during the time he is in custody. Article XXVI prohibits cruel, infamous or unusual punishment.

A. Prohibited treatment

42. A detainee may not be denied medical treatment while in custody. The Commission found that refusing for two weeks to allow independent doctors to examine detainees violated the detainees' right to humane treatment in detention. 542/ Denying a diabetic necessary medication is a serious violation of the right to humane treatment in detention. 543/ When a detainee is old and in ill health, the Government is obligated, for purely humanitarian reasons, "to provide him all necessary medical care and to establish his legal status posthaste." 544/

43. Both physical and psychological torture seriously infringe the prohibition against torture. 545/

44. The right to humane treatment under article 5 of the American Convention includes the right to be free from government actions which harm a person's reputation. A prominent member of a Nicaraguan opposition party brought a libel suit against a Nicaraguan magazine for reporting that he had received money from the United States Central Intelligence Agency. During the trial, the judge lost the petition and suspended the case. The Commission found that the Government had sanctioned the magazine report and harassed the man's attorney to hinder his work in the libel suit. 546/ The Commission held that the Government, by authorizing the magazine report and then preventing the victim from defending himself through the court system, had violated the right to humane treatment under article 5 (3) and the right to a remedy under article 25.

B. Prohibition of prolonged incommunicado detention

45. Incommunicado detention, particularly for a long period, violates article 5. The Inter-American Court, considering the case of a disappeared man, found that "prolonged isolation and deprivation of communication are themselves cruel and inhuman treatment ... and a violation of the right of any detainee to respect for his inherent dignity ... and therefore violates article 5." 547/

46. Detainees must be allowed contact with their lawyers as well as their families. 548/ Also, a time limit for incommunicado detention must be set. 549/ Incommunicado detention for 14 days is too long and violates the right to humane treatment. 550/

C. Prison/detention conditions

47. Article 5 (4) guarantees an accused person the right to be segregated from convicted persons save in exceptional circumstances, and the right to separate treatment appropriate to his/her status as an unconvicted person.

48. Overcrowding a prison violates both the rights of prisoners and unconvicted persons. The Commission observed the prison conditions in Panama where a prison for 250 housed 789 people. The Commission stated that overcrowding violates "the prison population's rights to a minimum living condition." 551/ In addition, the Commission found that article 5 (4) of the American Convention provides that unconvicted prisoners should be separated from convicted prisoners and that both should be afforded conditions which respect human dignity.

49. Detention facilities which are overcrowded, filthy and primitive and which also fail to provide space for recreation activities, violate a detainee's right to humane treatment. 552/

III. NOTICE

50. Article 7 (4) of the American Convention provides that anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. Article 8 (2) (b) also guarantees notification in detail of the charges against the accused.

51. A person must receive notice of charges before making any statement. Failure to give accused persons "prior and detailed information of the charges brought against them before making their statements" violates their right to notice. 553/

52. The Commission found that a general charge of criminal association against members of the Nicaraguan National Guard lacked the specificity needed to uphold convictions in many cases. The Commission's decision arose from its examination of cases decided by the Nicaraguan Special Tribunals which were established to try military personnel, officials and civilian employees, or persons associated with them, of the regime of General Somoza. In many cases, persons convicted of being members of the National Guard under Somoza were found to have necessarily committed the crime of "association with criminal

intent" and "the crime against international order". The Commission found that general accusations of this kind, without mention of specific charges, did not constitute a triable offence but required release. 554/ The Commission emphasized that members of an institution may not be made generally responsible for acts committed by some members. 555/

53. The Commission found that it is a flagrant violation of the right to notice when prisoners are not informed of the status of their trials, the period of detention or the sentences. The Commission held that prisoners should have access to such information as the date on which their sentence is to end, when their detention officially began and when they are eligible to be released before the end of their sentence. 556/ In a specific case, it was found to be a serious violation of the right to notice to have sentenced an individual to six months' imprisonment without informing him of his sentence. 557/

IV. RIGHT TO RELEASE PENDING TRIAL

54. Article 7 (5) of the American Convention states that a person must be tried within a reasonable time or released without prejudice to the continuation of the proceedings. The release may be subject to guarantees to assure appearance at trial.

55. Article XXV of the American Declaration provides that every person has the right to be tried without undue delay or released.

56. The Commission has not declared the precise time when detention becomes excessive and requires release. In Paraguay the court failed to indict a prisoner for several months without the possibility of release and thus violated the detainee's rights to personal liberty. 558/ The average pre-trial confinement in Panama was two to four years; such lengthy pre-trial detention violates an individual's right to trial within a reasonable time or to be released while proceedings continue. 559/

57. A judicial stay in proceedings for an unidentified period which subjects the accused to continuing detention, violates the accused's right to due process. An Argentine man charged with violating security laws remained in detention 11 months awaiting trial. The court granted a provisional stay in the proceedings and continued to hold the man in detention. The Commission found that prolonged detention without a specified term and without justified cause is an unreasonable restriction on liberty and violates articles XXV and XXVI of the American Declaration. 560/

58. Similarly, the Commission expressed concern that a Haitian law dealing with offences against the head of State or first lady did not provide the accused with the right to release on bail while the case was pending although such cases take years to complete. 561/ The law should provide a right to release on bail.

59. The Commission strongly disapproved of the imprisonment of accused persons for longer periods than their eventual sentence resulting from a delay in handing down final judgement. 562/

V. COUNSEL

60. Article 8 of the American Convention outlines several guarantees associated with the right to counsel. Article 8 (2) (c) guarantees the accused the right to adequate time and means for the preparation of a defence. Article 8 (2) (d) recognizes the accused's right to defend himself personally or to be assisted by legal counsel of his/her own choosing. The accused must be permitted to communicate freely and privately with counsel.

A. Right to select counsel

61. The court may not appoint counsel when the accused asks to select his/her own defence attorney. The Commission considered a Cuban case in which the court deemed an accused's request to select his own defence attorney unnecessary and appointed a defence attorney. The Commission found the appointment violated the accused's right to choose his own defence. 563/

B. Right to appointed counsel

62. Article 8 (2) (e) guarantees the right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend him/herself personally or engage his/her own counsel.

63. The Commission has considered several cases where Jamaicans convicted of murder and sentenced to death have alleged a violation of their right to a fair trial. In each case the petitioner was represented by counsel and the transcripts of the court proceedings were supplied upon request to the Commission. In these cases, the Commission generally found that the Jamaicans had received a fair trial. These decisions indicate the Commission's endorsement of systems where court records are kept and available, petitioners are represented by counsel, etc. 564/

C. Right to adequate counsel

64. A State may not take any actions which jeopardize an attorney's ability to defend a client. The Commission found that state intimidation of defence attorneys through arrests, the threat of sanctions against attorneys and demanding that the attorney "avoid use of defence motions that prevent justice from fulfilling its social function" prejudice a defendant's right to defence. 565/ Also, refusing to renew a lawyer's licence may undermine the right to counsel and may not be accomplished without a hearing. 566/ In Suriname the deaths of four lawyers, one who was the President of the Bar Association and others who were defending persons accused by the Government, created a climate of fear which made it impossible to form a new board of directors of the bar or to find lawyers willing to represent persons accused by the Government. The Commission found that this climate together with the Government's refusal to provide counsel for accused who could not find counsel seriously impaired the right to counsel. 567/ A judge may not use his/her authority to dissuade or intimidate attorneys from challenging the judge, openly expressing grievances and challenging judicial rulings on appeal. 568/

65. A civilian brought before a military court has the right to choose his/her own counsel and may not be compelled to accept someone appointed by the military. It is a serious violation of the right to defence when civilians are placed under military jurisdiction and are not allowed to choose their own defence attorney, but are assigned official military defenders who are not licensed lawyers. 569/

66. Counsel must be permitted to be present when the accused gives a statement, is interrogated, or when s/he signs a statement. 570/

67. The Commission found that formally prohibiting attorneys from visiting their clients in military hospital violates the rights to defence and counsel. 571/

68. Counsel must be allowed to bring papers and make notes when seeing a client in prison. 572/

D. Opportunity to prepare a defence

69. The accused must have notice of the trial date and of the charges sufficient to prepare a defence. Failure to inform the accused and his/her lawyer of the trial until the day of the trial, and to fail to inform the lawyer of the charges against the accused until the time of the trial, violate the right to counsel and to prepare a defence. 573/

70. The time set for trial must allow the accused sufficient time to investigate and prepare a defence. The Commission found that a time period of six weeks from the initial questioning and investigation through sentencing denied the accused adequate time and means for the preparation of a defence. 574/ During the investigation, the accused was detained incommunicado for 30 days. He said he was allowed only several minutes to prepare his defence with his lawyer. The Commission found that rapid proceedings denied the accused his rights under article 8 (2) (c).

71. It is a violation of the right to counsel when the defendant is not allowed to consult with counsel until only one hour before the opening of the trial or even until the beginning of the trial itself. 575/

72. An attorney preparing an appeal must have access to the evidence which the court considered in making its decision as well as the court's reasoning in arriving at the judgement. The Commission examined a case where defence counsel had access to the case file but where the real elements of the judgement were not in the file because the information had come from a secret source. In addition, military judges and prosecutors failed to set forth the reasoning or justification for the decision in their judgements and reports. The Commission found the actions violated the defendant's right to counsel. 576/

VI. HEARING

73. Article 7 (5) of the American Convention provides that every person who has been detained has the right to be brought promptly before a judge and the right to trial within a reasonable time or to release. Article 8 (1) provides

that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his/her rights and obligations of a civil, labour, fiscal or any other nature.

74. Article XXIV of the American Declaration recognizes every person's right to submit respectful petitions to a competent authority for a general or private interest and the right to obtain a prompt decision. Article XXVI recognizes the right to be presumed innocent until proven guilty. The court must make a decision in accordance with pre-existing laws.

A. Protection of civil suits

75. Article 8 (1) of the American Convention guarantees the right to a fair trial in both criminal and civil suits. Similarly, article XXIV of the American Declaration recognizes the right to a fair trial to determine a "private interest", that is, when the trial concerns a civil matter. Article XXV provides that no person may be deprived of liberty for non-fulfilment of a purely civil obligation. Article 7 (7) of the American Convention states that no one shall be detained for debt. In addition, American Convention article 25 guarantees the right to a judicial remedy for protection against acts that violate fundamental rights.

76. Although the Commission's cases and report examine fair trial rights primarily in criminal cases, the Commission has applied the scrutiny and fair trial standards developed in its criminal cases to non-criminal cases. 577/ The Commission's decisions suggest that the fair trial guarantees articulated in criminal cases would apply in appropriate civil cases.

77. The Inter-American Court also held that due process guarantees apply in non-criminal cases. In an advisory opinion the Court held that the principles of due process embodied in article 8 must be applied to the judicial remedies described in article 25 and that these judicial remedies are offered when any right guaranteed by the Convention is violated. 578/

B. Right to prompt trial

78. The Commission found that to determine what is meant by trial within a "reasonable length of time", it must consider the circumstances of each case. The Commission examined an Argentine law which permitted a judge to release a detainee if judicial proceedings exceeded two years. 579/ A man held for over four years during two separate proceedings for murders claimed the prolonged detention did not constitute a "reasonable period" under Argentine law and article 7 (5) of the Convention.

79. The Commission decided that the Argentine law did not violate the reasonable period requirement because a State is not bound to fix a period for release which applies to all cases independently of the circumstances. The Commission cited as authority a European Court case that took the seriousness of the violation into consideration in determining whether the detention had ceased to be reasonable. 580/ The European Court considered three factors to

determine the "reasonableness" of the detention: (a) the duration of imprisonment; (b) the nature of the crimes; and (c) the difficulties encountered during the trial. Applying the three factors to the Argentine's case, the Commission found that: (a) the severity of the crimes and the sentence they carried did not make the detention unreasonable and (b) where the accused's actions - not an unjustified delay in the administration of justice - caused the delay, the extended detention that resulted was not unreasonable. 581/

C. Equal access and opportunity to present evidence

80. At trial, an accused must be allowed sufficient time to present evidence. Where defence counsel had only eight days to submit evidence to the court and the prosecutor had as much time as he needed, the trial violated the defendant's right to defence. 582/

81. When government authorities refuse to perform an autopsy relevant to the case, they violate the accused's right to an independent and complete investigation. 583/

82. The authority to classify information secret should be restricted and regulated by the courts. The Commission found that granting the armed forces and police broad power to provide or withhold evidence within its jurisdiction from civilian courts blocks the proper functioning of the judicial system. A law adopted in Chile "during the reporting period [1987-1988]" allowed the military and police to classify a wide range of documents as secret documents and to withdraw them from the courts when it affected the security of the State. 584/

83. A tribunal cannot render an independent and impartial decision if it is restricted from considering evidence submitted by private parties and can only consider public documents. The Commission examined an electoral law passed by a state in Mexico which created a tribunal to review complaints in the electoral process but provided that only public documents could be considered in evidence. 585/ A political party challenging the law noted that public documents could only be issued by local officials and that those officials were subject to the control of the Government. The party claimed that the adjudication allowed the Government and ruling party to serve as both judge and participant in electoral complaint proceedings and to have the final word on complaints. The Commission found that the limitation of evidence to public documents was outside legal norms and that the law must be changed to comply with the article 8 requirement of an independent and impartial tribunal. 586/

D. Right to interpretation

84. Article 8 (2) (a) provides the accused with the right to be assisted without charge by a translator or interpreter if s/he does not understand or does not speak the language of the tribunal or court.

85. The right to an interpreter applies not only at trial but during pre-trial investigation and proceedings. Denying an individual an interpreter during questioning violates the defendant's right to an interpreter. 587/

E. Right to be presumed innocent

86. Every person has the right to be presumed innocent. The Government of Chile refused entry to a Chilean citizen it believed was a member of a revolutionary group. The Commission found that denying him entry on the basis that he was highly dangerous and a member of the revolutionary group violated his right to be presumed innocent and to a fair trial. 588/

87. Reversal of the burden of proof and placing the burden on the defendant to prove he is not guilty violates the right to be presumed innocent until proven guilty. 589/

F. Right not to be compelled to confess guilt or to testify against oneself

88. Article 8 (2) (g) guarantees the accused the right not to be compelled to be a witness against himself or to plead guilty. Article 8 (3) provides that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

89. A confession obtained during a 30-day incomunicado detention was invalid, whether or not pressure was used to extract the confession from the accused. The Commission considered the case of a Nicaraguan solider detained on espionage charges who claimed that the self-incriminating statement he made during his 30-day detention was given under duress and therefore invalid. The Nicaraguan Government argued that there was no actual pressure on the accused, except the pressure of the detention and investigation; the accused allegedly chose to make a statement and the accused could not maintain that the confession was extracted under pressure. 590/ The Commission held that a confession obtained during a period of incommunicado detention violated articles 8 (2) (g) and 8 (3) and was invalid. 591/

90. Forcing a detainee to sign a blank sheet of paper in advance of any proceeding violated the right to a fair hearing. 592/

91. The suspension of a statute protecting a defendant from testifying against himself or his family seriously violated the defendant's right not to be compelled to testify against himelf. 593/

92. Televising confessions by prisoners evidences a violation of the prohibition against compelled confessions and is itself a violation of the prisoners' rights. 594/

93. In a Special Court, when the defendant is required to give a categorical answer to all the charges against him, the defendant's right to a fair hearing is violated. 595/

G. Right to call and examine witnesses and be present at trial

94. Article 8 (2) (f) guarantees the accused the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.

95. The court must ensure that a detainee appears in court when summoned. When the defendant is detained and is unaware of the charges, is ignorant of what the witnesses have said and that the investigation, trial and sentencing are held without his presence, his right to examine witnesses and to present his defence are seriously impaired. 596/ Failure to obtain the accused's appearance interferes with the legal process and denies the accused the right to a hearing and to prepare a defence. 597/

96. Creation of an environment of fear, to the extent that the defence is afraid to present witnesses "to contradict accusations made by the State" seriously prejudices the defendant's right to present witnesses in his/her own defence. 598/

97. The prosecution's failure to call witnesses who might have been able to testify in favour of the accused about the events in question seriously prejudices the defendant's right to present his/her defence. 599/

H. State actions constituting punishment which require a hearing

98. Article 5 (3) declares that punishment shall not be extended to any person other than a person convicted of a criminal offence.

99. Expulsion is punishment and cannot be ordered without a fair trial. A Paraguayan writer was expelled from his country by an administrative decree for painting political slogans on walls. The Commission found that the liberty of persons includes the liberty of remaining in the country of citizenship. Since expulsion denies this liberty and can be ordered for an indeterminate length of time, it is a more onerous sanction than being sentenced for a crime and requires the guarantees of a fair trial. 600/

100. The detention and subsequent expulsion of a German priest from Guatemala without a trial violated articles 7, 8 and 25 of the Convention. 601/

VII. DECISION

101. Article 8 (1) of the American Convention gives every individual the right to a hearing before a competent, independent and impartial tribunal previously established by law.

102. Article XVIII of the American Declaration provides every person with the right to resort to the courts to ensure respect for his/her legal rights. Article XXVI recognizes the right to an impartial public hearing.

A. Independence of the judiciary

103. Trying civilians for political crimes before military courts violates the right to a hearing before an independent and impartial tribunal. In its report on Nicaragua the Commission found the military courts were handling proceedings affecting basic rights and that regular courts were not investigating violations. Accordingly, the Commission found violations of the rights to a fair trial and due process. 602/ The Commission also found that

the Government classified political crimes as military offences so as to subject civilians to the jurisdiction of military courts and that this action substantially jeopardized the individual's right to a fair hearing by a competent tribunal. 603/

104. The Commission noted several obstacles facing the judiciary which prevent autonomous and efficient administration of justice: the suspension of constitutional guarantees, the absence of judicial norms which ensure authentic decision-making and independence of the judiciary; the lack of political or police support in implementing decisions; inadequate protection for judges against vengeance and professional reprisal; and unwieldy legislation causing long delays in trial. 604/

105. The Commission noted with approval three measures by Paraguay to enhance there independence of the judiciary. 605/ First, Paraguay separated the judiciary from the executive branch and governing party. Second, the Government appointed politically independent jurists as well as opposition party members to the Supreme Court. Third, Paraguay introduced an amendment to change the term of judges from a five-year term that was subject to executive discretion for renewal to a stable career system. 606/

106. The Commission recommended the appointment of permanent magistrates to safeguard the independence and impartiality of the judiciary. 607/ Magistrates and judges should not be removed without cause. It found that judicial independence was threatened when executive or military authorities "assume the power to remove any sitting judge without prior judgement or complaint of misconduct ...". 608/ In addition, judges should not be subject to removal by superior judges. 609/ It also recommended staggering the appointment of Supreme Court judges to prevent the executive from "packing" the court and diminishing its independence. 610/

107. The right to the independence of the judiciary includes the right to be free from hostility and arbitrary interference in the exercise of judicial functions including the work of public prosecutors. 611/

108. Where the prosecution is in charge of special prosecutors appointed by the President whose identities are unknown but who could be lawyers or army officers, the defendant's right to a procedurally fair hearing is prejudiced. 612/

109. Placing prisoners at the disposition of the chiefs of police who "act as judges and may order arrests, through summary procedures", without even hearing the accused in some cases, merges the judicial function into the authority of military bodies and denies the accused their due process rights. 613/

110. A Truly autonomous judiciary must be able to investigate and try senior officials and authorities who may be involved in crimes. The Commission noted with disappointment that several government authorities in Paraguay tried and sentenced for participating in the theft of millions of dollars from the Central Bank remained free. 614/

1. Requirement that decision be based upon the evidence

111. The judge must make a decision based upon what has come before him/her and independently of other judges. The Commission found that when a judge consults other judges in order to reach a collective agreement regarding a problem, instead of reaching a decision independently, the court violates the accused's judicial guarantees. 615/ When there "is no introduction of evidence and the sentence is imposed, without any objective criteria, by the unilateral decision of the police judge", the defendant is denied the right to hearing by a competent, independent and impartial tribunal. 616/ When evidence is presented at trial but the court's decision is based solely on the conscience and equity of the court, the decision violates the defendant's right to a fair hearing. 617/

112. The Commission found that it is a serious violation of the right to an impartial hearing when judges consult the opinion of higher authorities in making a decision in order to ensure that their decisions are upheld. 618/

113. Rules of evidence and not the personal convictions of judges must be used to weigh the evidence. 619/ The Commission held that the free admission of evidence and the discretionary evaluation of that evidence by the (Nicaraguan) Special Tribunal, with no restrictions on what evidence should be admitted or kept out, is conducive to judicial error and prejudices the defendant's right to a fair trial. 620/

2. Publicity prejudicing the trial

114. State acts which create public bias against an accused violate the right to a fair hearing. The Commission examined the use of solicitations to obtain evidence. Government authorities placed advertisements in newspapers with photos of the accused containing definite implications that the accused were the authors of the crimes charged. It found that the State had jeopardized the defendant's right to a procedurally fair hearing. 621/

115. Televising incriminating confessions made by defendants before a final verdict is rendered "leads public opinion to prejudge the guilt of the defendants" and seriously violates the "fundamental dictates of due process". 622/

3. Recusal

116. The requirement of impartial judges requires a judge to recuse him/herself if s/he has some connection with the case which may bias the decision. Control of a criminal investigation by government officials who are relatives of the accused constitutes a clear conflict of interest and infringes the right to an independent and impartial investigation. 623/ If military courts are "composed of officers involved in the repression of the same crimes they are judging ...", their impartiality is suspect. 624/

B. Right to public trial

117. Article 8 (5) of the American Convention requires that criminal proceedings shall be public, except in so far as may be necessary to "protect the interests of justice".

118. The Commission found that secret proceedings of a military tribunal trying army personnel for the death and serious injury of two citizens denied the victims due process of law. The secrecy made it virtually impossible for the victims' lawyers to gain access to basic elements of the trial and allowed military authorities to control the evidence submitted. The Commission held that these military judicial proceedings abused the recourse to secrecy. 625/ In another case, it found the failure to publicize Special Court trials in the plenary stage violated the right to a public hearing. 626/

C. Right to have judgement made public

119. There are no decisions known at this time which elaborate this right.

D. Right to benefit from lighter penalty

120. Article 9 of the American Convention prohibits courts from applying an ex post facto law and declares that if subsequent to the commission of the offence the law provides for a lighter penalty, the guilty person shall benefit from it.

E. Prohibition of second trial for same offence

121. Article 8 (4) of the American Convention provides that an accused person who has been acquitted shall not be subjected to a new trial for the same cause.

F. Prohibition of group trials

122. Group trials, where numerous individuals are tried together but sometimes given different sentences, undermine an individual's right to a fair hearing and preclude "a more individualized consideration of their cases." 627/

G. Sentencing and punishment

123. Article 5 (6) of the American Convention provides that punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

124. Article XXV of the American Declaration guarantees the right to humane treatment while in custody.

125. When a Special Court automatically doubles the penalty indicated in the relevant law and applies the death sentence to a large number of offences that previously were not punished so severely, the prohibition against excessive punishment is violated. 628/

VIII. APPEAL

126. Article 8 (2) (h) guarantees the right to appeal a judgement to a higher court.

127. A court must stay execution of the sentence while the case is on appeal. The Commission found that executing the death penalty while the sentence is on appeal violates the defendant's right to appeal. 629/

128. The right to due process requires full judicial observance of all rights, not only during the investigation and trial at the lower court but in all stages of appeal or review. In a case submitted by an Argentine citizen, the Commission found that the guarantee of due process requires a court on appeal to examine whether or not due process was observed by the lower court. 630/ The Argentine man, imprisoned after conviction for politically motivated offences, sought an appeal of his 1979 conviction and life sentence. He claimed that the trial court had violated his due process rights and had used a confession obtained under torture. Although the first trial occurred in a military-influenced court, when a constitutional court reviewed his case it denied a new trial. The Supreme Court also denied his petition for review. In denying a review, the Supreme Court reasoned that the appeal brief failed to provide a basis on which to order an investigation and review.

129. The Commission found that the reviewing courts failed to consider and protect the petitioner's due process rights. According to the Commission, enforcement of the judicial guarantees in article 8 (1) and article 25 (1) require more than "mere formal verification of procedural requirements". It noted that the record before the reviewing courts showed many indications that the convicted man had been imprisoned on evidence illegally obtained under coercion. 631/ The Commission held that during the appeal process courts must examine not only the grounds for appeal but whether or not due process had been observed throughout the judicial proceedings. 632/

130. When evidence indicating the innocence of an accused is discovered after the person is tried and convicted, the case must be reconsidered in light of the evidence. A man convicted of murder and sentenced to death in Jamaica subsequently discovered evidence that showed he could not have committed the murder. The evidence came from the pathologist's testimony at the trial but neither the defence nor the court took notice of the exculpating evidence. On appeal, the court denied review without considering the new evidence. The Commission held that the appeals process must permit a correction. 633/

131. The right to appeal must provide a genuine review of the case and must be timely. It is a violation of the right to appeal when, although the right exists by law, the political chief of the locale either routinely confirms the sentence imposed by the police judge, or the sentence has already been served by the time the appeal has been decided by the Supreme Court. 634/

132. It seriously undermines the right to appeal to threaten a defendant with a longer sentence if s/he appeals. 635/

IX. REMEDIES

133. Article 7 (6) of the American Convention guarantees anyone who is deprived of his/her liberty the right of recourse to a competent court so that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. Article 10 provides every person with the right to be compensated in accordance with the law in the event s/he has been sentenced by a final judgement through a miscarriage of justice. Article 25 provides every individual the right to simple and prompt recourse to a competent court for protection against acts that violate his/her fundamental rights under the American Convention or under the laws and constitution of the State.

134. Article XVIII of the American Declaration provides that there should likewise be available to each person a simple, brief procedure whereby the courts will protect him/her from acts of authority that, to his/her prejudice, violate any fundamental constitutional rights.

135. A person convicted of a crime has the right to seek pardon, amnesty or commutation of sentence. The Commission considered a law in Suriname which empowered the "cadres of the national army" to try and sentence an individual to death. It found that where the decision to impose the death penalty is mandatory and unappealable the law, the individual's right to seek pardon, amnesy or commutation of sentence is prejudiced. 636/

136. When a government official who is accused of violating human rights is tried, convicted and sentenced in accordance with current legal provisions, there is no violation of the Convention. The Inter-American Court considered a case where a Costa Rican civil guard was accused of violating the human rights of three prisoners by assaulting them and ultimately killing one prisoner. 637/ After criminal charges were brought against the guard he was tried, convicted, sentenced and incarcerated. The Inter-American Court found the petition alleging a violation of the victim's rights inadmissible where the Government of Costa Rica acted in conformity with the law and punished the person responsible with full force. 638/

137. A judicial remedy to victims of human rights violations must uphold the rules of due process and all rights guaranteed by the Convention. The Commission noted that States have a legal duty to provide remedies to victims of human rights violations under article 25. The Commission concluded that these remedies must be pursued in accordance with the rules of due process of law (art. 8 (1)) and guarantee the free and full exercise of the rights recognized by the Convention. 639/

138. A State must ensure that a remedy is effective in practice. The Inter-American Court examined a complaint alleging that Honduras had violated articles 4 (right to life), 5 (right to humane treatment) and 7 (personal liberty) in the disappearance of a Honduran school teacher. The Government maintained that the complaint was inadmissible and that domestic remedies had not been exhausted. A petition for habeas corpus was filed but officials denied holding the school teacher. The investigating judge accepted this

response and discontinued consideration of the petition. Honduran law required the identification of the place of detention and the authority ordering the detention in a writ of habeas corpus. The Commission noted that although the remedy of habeas corpus existed it was not effective for finding a person clandestinely held by state officials. The Commission cited the State's obligation under article 25 and article 46 (1) to provide an effective remedy. 640/ A remedy is not a true remedy unless it is effective in practice and produces the expected result. 641/ The Commission noted three examples of procedural requirements which make the remedy of habeas corpus ineffective: "if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied". 642/ The Inter-American Court found that Honduras had failed to provide effective remedies to guarantee the individual's rights under articles 4, 5 and 7. 643/

X. NON-DEROGABILITY

139. Article 7 (6) of the American Convention provides that where the laws of a State provide that anyone who believes him/herself to be threatened with deprivation of liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat; this remedy may not be restricted or abolished. The interested party, or another person on his/her behalf, is entitled to seek these remedies.

140. Article 27 allows a State to derogate from its obligations under the Convention during certain times of public emergency. Article 27 (2) states that the suspension does not apply to several provisions, including article 5 (right to humane treatment) or article 9 (freedom from Ex Post Facto laws), or to the judicial guarantees essential for the protection of such rights.

141. Article 30 of the American Convention provides that any restrictions on the enjoyment of rights recognized in the Convention may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

142. In an advisory opinion, the Inter-American Court distinguished temporary suspension of obligations under article 27 from the restrictions which could be applied under article 30. 644/ The Court found that restrictions "in accordance with laws" means the restrictions must be established by a law passed by the legislature in accordance with the constitution of the State. The Court emphasized the importance of the consent of the people in placing any restrictions on a State's obligations. 645/

143. In another advisory opinion, the Inter-American Court was asked to determine the judicial guarantees essential for the protection of non-derogable rights under article 27 (2). 646/ The Court noted that article 25 requires States to provide effective judicial remedies to victims of human rights violations and reasoned that where the judicial remedies relate to rights not subject to derogation under article 27 (2), such remedies are necessary for the protection of these rights and are non-derogable. 647/ The Court found that the non-derogable judicial guarantees include habeas corpus, amparo and any other effective remedy before judges or a

competent tribunal designed to guarantee the rights not subject to derogation under article 27 (2). 648/ The Court held that the principles of due process of law expressed in article 8 must be observed when providing judicial remedies and therefore are non-derogable when providing the essential judicial guarantees. 649/

144. The Commission maintains that the working of the judiciary should not be inhibited during states of emergency. Recognizing that emergency situations may arise which justify use of extraordinary measures, the Commission urged States not to grant powers to the central Government or a government organ which inhibits the judiciary from reviewing government measures. 650/

145. The Commission expressed concern that suspensions and restrictions in effect during the state of siege deny individuals the right to exercise remedies that provide judicial protection for elementary rights whose exercise may not be impaired. 651/

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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Third report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

Addendum

RIGHT TO AMPARO, HABEAS CORPUS, AND SIMILAR PROCEDURES

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Introduction

1. This part of the report discusses amparo and habeas corpus as an aspect of the right to a fair trial. This part also contains the notes for the entire third report on the right to a fair trial.

2. During the discussion of the first two fair trial reports at the forty-second and forty-third sessions of the Sub-Commission, members suggested that the right to petition for habeas corpus or amparo should be made non-derogable even during periods of emergency. Pursuant to the request of the Sub-Commssion contained in its resolution 1991/15, the Commission, in its resolution 1992/35, called on all States "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful ... [and] to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency."

3. This addendum to the report summarizes the nature of amparo and habeas corpus, the sources of internatinal amparo/habeas corpus norms, and the issue of derogability. National interpretations of the right of habeas corpus will be considered in the fourth fair trial report to be presented in 1993.

I. AMPARO

4. Amparo is a Latin American writ enabling a claimant to seek protection from any governmental infringement of rights and duties. While amparo can be used to challenge illegal detention (like the habeas corpus writ), it can be used against other illegal conduct as well.

5. Because amparo can be applied to all rights, "it is possible to conclude that amparo comprises a whole series of remedies and that habeas corpus is but one of its components." 652/ In some cases habeas corpus has the function of an independent remedy, while in other circumstances, habeas corpus is seen as either the "amparo of freedom" or as an integral part of amparo. 653/ When habeas corpus functions an an independent remedy, its primary purpose is to protect the personal freedom of detainees or those threatened with detention.

6. The writ of amparo was included in various international human rights instruments beginning with article 18 of the American Declaration of the Rights and Duties of Man in May 1948. 654/ In December 1948, the amparo writ was incorporated into article 8 of the Universal Declaration of Human Rights. 655/ Article 8 of the Universal Declaration of Human Rights was implemented in 1966 through article 2 (3) of the International Covenant on Civil and Political Rights. 656/ In 1969 the amparo writ was incorporated into the American Convention on Human Rights. 657/

7. Although the amparo provisions in the international human rights instruments provide a simple remedy to protect against abusive acts of any authority, the applications of the writ in Latin America vary widely. There are two basic categories of the Latin American amparo. 658/ First, the

majority of Latin American jurisdictions use amparo to safeguard all human rights established in national constitutions, with the exception of personal liberty, which is protected by the habeas corpus writ. 659/ "In Guatemala and, to a great extent, Honduras and Nicaragua, the amparo also may be employed to challenge the constitutionality of laws, but the effect of a declaration of unconstitutionality is limited to the litigants in that particular case." 660/

8. The Mexican writ of amparo covers five distinct functions, which extend to the whole constitutional, statutory and administrative legal order. 661/ The five functions include: (1) the "liberty amparo (amparo de la libertad) which protects life and personal liberty in the manner of habeas corpus; (2) the "amparo against the laws" (amparo contra leyes) which challenges unconstitutional laws; (3) the "amparo-cassation" (amparo-casación) which reviews judicial decisions of any level; (4) the "administrative amparo (amparo administrativo) which checks the conduct of administrative authorities; and (5) the "agrarian amparo" (amparo en materia agraria, ejidad y comunal) which protects the rights of farmers subject to the administration of agrarian reform laws. 662/

9. The Mexican writ of amparo has influenced, directly or indirectly, the development of the writ in other Latin American nations including Argentina, Bolivia, Chile, Costa Rica, Ecuador (at least until 1971), El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay and Venezuela. The Brazilian mandado de segurança (writ of security) also bears the distinct imprint of the Mexican writ. 663/

II. HABEAS CORPUS

10. Habeas corpus the "Great Writ," is a remedy often described as "the bulwark of individual freedom" 664/ because it allows detainees to pursue a prompt judicial challenge of the lawfulness of their detention. Habeas corpus is a key to the protection of all other human liberties. 665/ The habeas corpus right protects detainees in two ways. First, the personal freedom of the detainee is protected through having the legality of the detention determined. Second, the life and physical integrity of the detainee is protected through the procedure of being brought before a judge.

11. The right of judicial review of detention can be traced as far back as Roman times and can be seen in different forms throughout history. Today, many constitutions throughout the world provide for a habeas corpus right, 666/ while some of the main international instruments on human rights also contain equivalents to habeas corpus. 667/ In some countries, however, the right to habeas corpus has been suspended under states of emergency or is rendered ineffective de facto leaving detainees susceptible to violations of other fundamental human rights. 668/ The Inter-American Commission of Human Rights stated that "it is precisely in these special circumstances [states of emergency] that the writ of habeas corpus acquires its greatest importance." 669/

III. SOURCES OF INTERNATIONAL AMPARO/HABEAS CORPUS NORMS

A. International instruments with amparo/habeas corpus provisions

12. Article 9 (4) of the International Covenant on Civil and Political Rights provides:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

13. Article 9 (4) is considered a habeas corpus provision even though the words "in the nature of habeas corpus" from earlier drafts of the Covenant were deleted to allow States the freedom to fashion remedies through their own legal systems.

14. A provision similar to article 9 (4) of the International Covenant on Civil and Political Rights may be found in the European Covention, article 5 (4):

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

15. The equivalent of amparo/habeas corpus are also found in the American Covention on Human Rights. Article 7 (5) provides:

> "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

Article 7 (6):

> "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty has the right of recourse to a competent tribunal in order that it may decide on the legality of such threat, this remedy may not be restricted or abolished. The interested party, or another person on his behalf, is entitled to seek these remedies."

16. Unique to the Inter-American system is the provision of amparo, which incorporates the habeas corpus right in some cases. Article 25 of the American Convention sets forth the procedural institution of amparo, which is a simple, prompt remedy for protecting all constitutional rights and laws recognized by the State parties and by the Convention.

17. Article XXV of the American Declaration of the Rights and Duties of Man provides:

> "...
>
> "Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released ..."

18. An effective remedy in the nature of habeas corpus can also be inferred from the African Charter on Human and Peoples' Rights, article 6: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Similarly, article 7 (1) (a) can be read to provide relief against violations of fundamental rights, such as liberty: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."

B. Interpretations of the right to habeas corpus in the criminal context

19. Most interpretations of habeas corpus have occurred in the European system and revolve around the meaning of article 5 (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Interpretations have centred on what type of body may be considered a "court" for purposes of satisfying article 5 (4) and how "speedily" a court must determine the lawfulness of detention.

1. What qualifies as a "court"

20. In 1971 the European Court of Human Rights addressed the nature of the "court" to which access must be given in the "Vagrancy Cases." 670/

> "[I]n order to constitute such a 'court' an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure.
>
> In sum, the Court considers that the intervention of one organ satisfies Article 5 (4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question ..."

21. The Court held that the administrative procedure under Belgian law whereby a magistrate makes decisions to detain vagrants could not be considered a "court" within the meaning of article 5 (4) of the European Convention. While allowing for a hearing and a public decision, the procedure was not sufficient, considering that a long deprivation of liberty (from 7 to 21 months) was at stake along with various shameful consequences. 671/

22. There is a need to control the "lawfulness of the detention." A court must have jurisdiction to control all aspects of the decision to detain whether relating to fact or law. Power to release the detainee is needed if an unlawful detention exists. The Belgian Conseil d'Etat did not satisfy the requirements of article 5 (4). 672/ Hence, advisory bodies such as mental health review tribunals or parole boards are not a "court" under article 5 (4). 673/ Article 5 (4) of the European Convention means only that the authority must possess a judicial character (independent of the executive and the parties).

23. According to the Engel case, 674/ military tribunals, even with military personnel, may be sufficiently independent to be considered a "court". 675/

24. While military tribunals may be a "court" under the European Convention, the Human Rights Committee has a more restricted view of military proceedings. The Committee held that an authority is not a "court" simply because it views detention according to established legal procedures. The court must be a court of law. The Committee found that a military disciplinary proceeding and a military appeal process did not equal a "court" for purposes of article 9 (4) of the International Covenant on Civil and Political Rights. 676/ In the same case, the Committee held that a supervisory military officer is not a "court" under article 9 (4). 677/ In another case, the Committee found that a Minister of Interior could not review the detention with the necessary objectivity. 678/

25. While Article 5 (4) of the European Convention does not give the same procedural rights as article 6 (1), 679/ the article does require that procedures for challenging detention be taken before a court, that the remedies be determined speedily 680/ and that the procedural guarantees be adequate in the circumstances.

2. The meaning of "speedily"

26. Remedies must be determined speedily 681/ or "without delay". 682/ The view of the European Commission on Human Rights has evolved into finding, in general, that delays of several months violate article 5 (4) of the European Convention.

27. In 1971, the European Commission of Human Rights found that a hearing within three months of arrest was sufficient under article 5 (4) for the requirement of speedy determination. 683/ More recent cases have found violations for delays of several months. Sanchez Reisse v. Switerzerland 684/ found that two separate periods of 31 days and 46 days violated article 5 (4). Zamir v. United Kingdom 685/ held that a 4 1/2-month delay was a violation of article 5 (4). Luberti v. Italy 686/ found an 18-month delay too long. Van Drocgenbroeck v. Belgium 687/ held that a 6-month delay violated article 5 (4).

28. In the context of military discipline, the European Commission of Human Rights is more strict with its time limitations. The Commission found a one-month delay in the determination of the legality of detention to violate

article 5 (4). 688/ In Christinet v. Switzerland the European Commission found that final decisions after 10 and 16 days where the applicant was already detained for many years were consistent with article 5 (4). 689/

29. Because the habeas corpus remedy needs to be determined speedily under article 5 (4), "[f]ull written proceedings or an oral hearing of the parties in the examination of such remedies would be a source of delay which it is important to avoid in this field". 690/

30. The Human Rights Committee is quite strict on the issue of delay in habeas corpus proceedings. The Committee held that a seven-day detention with no opportunity to challenge detention before a court violated article 9 (4) of the International Covenant on Civil and Political Rights. The Committee found, however, that it is not useful to set precise deadlines for issuing judgements. Timeliness should be judged on a case-by-case basis. 691/

C. Interpretations outside the criminal context

31. The right to challenge detention applies to all forms of detention. For example, the European Court and Commission of Human Rights have applied article 5 (4) of the European Convention to detainees of unsound mind, members of the armed forces and vagrants. A 10-month detention of an "undesirable alien" pending deportation, however, was held not to violate article 5 (4). 692/ Article 9 (4) of the Covenant on Civil and Political Rights protects individuals detained in non-criminal cases. 693/

1. Mental illness

32. "[P]ersons detained as mentally ill have the right to challenge the lawfulness of their detention before a court, initially and at regular intervals thereafter." 694/ The European Court of Human Rights stated:

> "[T]he reasons initially warranting confinement of this kind [i.e. on grounds of mental disorder] may cease to exist. Consequently, it would be contrary to the object and purpose of article 5 to interpret paragraph 4 thereof, read in its context, as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals." 695/

33. While the Court stated that article 5 (4) did not necessitate the same "fair trial" guarantees as article 6 (1), it was essential for the detainee to have

> "access to a court and the opportunity to be heard in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty.' Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves ..."

"As to the particular facts, the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of the outcome; neither was he heard by the courts or given the opportunity to argue his case."

"In this fundamental respect, the guarantees demanded by article 5 (4) of the Convention were lacking both in law and in practice ..." 696/

A mentally ill detainee, however, cannot claim a violation of article 5 (4) if information in his file is witheld from him (provided the file is made available to the detainee's lawyer). 697/

34. Like its decision in the Winterwerp case, the European Court of Human Rights clarified in X. v. United Kingdom 698/ that a mentally ill detainee had the right to automatic periodic review of the detention or to initiate proceedings challenging the detention at reasonable intervals. 699/ Furthermore, the Court held that article 5 (4) required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety.

35. Similarly, article 5 (4) of the European Convention was violated with respect to the continued detention of a mental patient. The court held that there had not been at the relevant time adequate proceedings whereby the lawfulness of detention could be decided speedily by a court as required. 700/

2. Armed forces

36. The European Court of Human Rights has observed that the European Convention applies in principle to members of the armed forces and not only to civilians. 701/ It is necessary, however, when interpreting and applying the Convention to take into account particular characteristics of military life. 702/ Three criteria are used when deciding cases involving military discipline: the domestic designation of the offence as disciplinary or criminal, the inherent nature of the offence and the severity of the penalty. 703/

3. Vagrancy

37. The European Convention's guarantees also apply to vagrants. The procedure for ascertaining whether or not a person is a vagrant, thus possibly subjecting the person to detention in a vagrancy centre, must consist of the guarantees provided for in article 5 (4) of the European Convention. 704/

IV. DEROGABILITY

38. The right of habeas corpus is not specifically included among those rights from which no derogation is possible under the International Covenant on Civil and Political Rights, article 4, and the European Convention, article 15. 705/

39. The Inter-America Court of Human Rights decided in 1987 that habeas corpus should be non-derogable. Article 27 of the American Convention on Human Rights permits a State party to derogate from its obligations "in time of war, public danger, or other emergency that threatens the security" of the State party, but only "to the extent and for the period of time strictly required ... provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination ..." Article 27 explicitly prohibits a State party from suspending 11 articles of the Convention, as well as "the judicial guarantees essential for the protection of such rights."

40. Two Advisory Opinions issued by the Inter-American Court of Human Rights held that habeas corpus and amparo - the legal remedies guaranteed in articles 7 (6) and 25 (1) - may not be suspended, even in emergency situations, because they are among the "judicial guarantees essential" to protect the rights whose supension article 27 (2) prohibits. 706/ In the first Opinion, the Court pointed out that habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret, and in protecting against torture or other cruel, inhuman or degrading punishment or treatment. 707/ The Court buttressed this conclusion by reference to bitter realities in recent decades, particularly disappearances, torture and murder committed or tolerated by some Governments. 708/ Such experience has demonstrated that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended. 709/

41. In finding that habeas corpus is an essential judicial guarantee of the non-derogable rights enumerated in article 27, and therefore is itself non-derogable, the Court cited the special role that habeas corpus plays in any system governed by the rule of law. The "suspension of guarantees" under article 27 does not imply a temporary suspension of the rule of law. 710/ Even in a state of emergency, when guarantees are suspended, a Government does not acquire absolute powers that go beyond the circumstances justifying the state of emergency.

42. The Court also linked habeas corpus to the "effective exercise of representative democracy" referred to in article 3 of the OAS Charter. 711/ Any suspension of guarantees under article 27 lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. 712/ In the context of a democratic system, habeas corpus is essential to protect the non-derogable rights and freedoms listed in article 27 and therefore may not be suspended.

43. There exists, however, a question about the Court's reasoning. Neither article 25 (1) nor article 7 (6) of the American Convention requires that detainees be brought into the presence of a judge. Therefore, it is unclear how a judge can determine whether the detainee has been ill-treated or killed. 713/

44. In its second Advisory Opinion, the Inter-American Court stated that the "essential" judicial guarantees that are not subject to derogation according to article 27 include habeas corpus, amparo and any other effective remedy before judges or competent tribunals which is designed to guarantee respect

for the rights and freedoms whose suspension is not authorized by the Convention. The Court also stated that the judicial guarantees should be exercised within the framework and the principles of due process of law expressed in article 8. 714/ Furthermore, the Court emphasized that the judicial nature of the guarantees implies "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency". 715/

45. Other developments promoting the non-derogability of habeas corpus include the guidelines for the development of model legislation to be applied in emergency situations presented in a report by the Sub-Commission's Special Rapporteur on states of emergency. 716/ These guidelines stated that "No person deprived of liberty ... shall be denied ... the right to challenge the legality of the deprivation of liberty before a court of law by habeas corpus or other prompt and effective remedy." 717/ The Special Rapporteur considered the opinion of the Inter-American Court to be of "universal relevance", 718/ stating "if the derogation from a given right would cause violations of another right which is non-derogable, derogation of the former cannot be permitted, regardless of whether or not it appears in the list of non-derogable rights". 719/ The Special Rapporteur concluded that habeas corpus should be non-derogable under the International Covenant on Civil and Political Rights even though it is not included in the list of non-derogable rights of article 4 (2). 720/

46. The Working Group on Enforced or Involuntary Disappearances has noted that habeas corpus is "potentially one of the most powerful legal tools for unearthing the fate or whereabouts of a disappeared person. The most sophisticated rules governing this institution, however, are rendered inoperative in a situation where cooperation stops at the barracks gate". 721/

47. The Human Rights Committee disfavours any suspension of the right to habeas corpus even though the International Covenant on Civil and Political rights does not expressly make habeas corpus non-derogable. The Human Rights Committee found a violation of article 9 (4) of the International Covenant on Civil and Political Rights because a detainee had no recourse to habeas corpus. 722/ The Human Rights Committee stated that because habeas corpus was denied to persons arrested and detained in Uruguay under "prompt security measures" since they were thought to be "a grave and imminent danger to security and public order", article 9 (4) of the International Covenant on Civil and Political Rights was violated. 723/ The Inter-American Court has stated:

> "[I]t should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country ... cannot be considered effective. That could be the case ... when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgment ..." 724/

48. Similarly, the International Commission of Jurists in its 1983 study recommended:

> "The civilian judiciary should retain jurisdiction during a state of emergency to review individual cases of detention at least (i) to ensure that the stated grounds for detention are valid and sufficient (ii) to ensure that proper procedures have been complied with and (iii) to ensure that the conditions of detention are lawful." 725/

49. The International Commission of Jurists and the Federation Internationale des Droits de l'Homme have proposed to the Working Group on Detention of the Sub-Commission that it recommend to the Sub-Commission and the Commission on Human Rights that they call on States "to maintain, at all times and under all circumstances, the right to habeas corpus as set forth in article 9 (4) of the International Covenant on Civil and Political Rights". 726/

50. Other experts have come to similar conclusions about the judiciary during states of emergency. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights adopted by an international panel of experts convened by the International Commission of Jurists in 1984 concluded that "[t]he ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated". 727/

51. The Inter-American Commission has held that the habeas corpus remedy must be effective - "that is, capable of producing the results for which it was designed". 728/ In a Honduran case, three writs of habeas corpus brought on behalf of a "disappeared" Honduran student were not determined by the courts. The Honduran Government asserted that there was a failure to exhaust domestic legal remedies. The Commission, however, stated that the objection of failure to exhaust domestic legal remedies presupposes the existence of an effective remedy. Testimony showed that habeas corpus remedies in Honduras were ineffective or were mere formnalities in the period in which the events took place in obtaining the liberty of victims of enforced or involuntary disappearances ordered or tolerated by the Government. To say that a person has not exhausted all domestic remedies, the remedies must be effective. Hence, government compliance is needed. 729/

52. The Human Rights Committee found violations of article 9 (4) of the International Covenant on Civil and Political Rights because two Uruguayan nationals were denied any effective remedy to callenge their arrests and detentions. Uruguay was under obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victims. 730/

53. The draft declaration on the protection of all persons from enforced or involuntary disappearances provides for the use of habeas corpus to determine the legality of arrests and the detainee's condition. Article 9 (1) of the draft declaration provides:

"Each State shall ensure under all circumstances, including those mentioned in article 7, the right to an effective judicial remedy, including habeas corpus, as a means of determining the whereabouts or the state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty."

Article 9 (2) of the draft declaration provides:

"In such proceedings, competent authorities, national or international, shall have access to all places holding persons deprived of their liberty and to each part thereof, as well as to any place in which there are grounds to believe that such persons may be found."

54. Although habeas corpus and related procedures for challenging detention were not expressly made non-derogable under the three main multilateral treaties which recognize the right, habeas corpus should now be seen as non-derogable. If habeas corpus is going to be an effective remedy to protect other non-derogable rights, not only should habeas corpus itself be non-derogable under all situations, but it should be in practice an efficacious means at all times to challenge the legality of detention.

Notes for the third report

1/ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 222, entered into force 3 Sept. 1953 [hereinafter "the European Convention"].

2/ X. v. United Kingdom, 21 Dec. and Rep. 168, 170 (8 Oct. 1980).

3/ König case, 27 Series A (28 June 1978).

4/ Kaplan v. United Kingdom, 21 Dec. and Rep. 5, 30 para. 154 (17 July 1980).

5/ Ringeisen case, 13 Series A (16 July 1971); König case, supra, at 30, para. 90.

6/ König case, supra, at 30, para. 90.

7/ Ringeisen case, supra, para. 94.

8/ Kaplan v. United Kingdom, supra, at 29, para. 152.

9/ Id.

10/ König case, supra, at 30, para. 90.

11/ Kaplan v. United Kingdom, supra, at 31, para. 157.

12/ Id. at 33, para. 163.

13/ X. v. Belgium, 24 Dec. and Rep. 198 (10 March 1981)

14/ Zand v. Austria, 15 Dec. and Rep. 70 (12 Oct. 1978).

15/ Golder case, 18 Series A (21 Feb. 1975).

16/ Isop v. Austria, 5 Y.B. 108 (8 Mar. 1962).

17/ Winterwerp case, 33 Series A 23 (24 Oct. 1979).

18/ Kaplan v. United Kingdom, supra: see also Albert and Le Compte v. Belgium, 58 Series A (10 Feb. 1983).

19/ Van Marle and others v. the Netherlands, 21 Dec. and Rep. 180 (13 Oct. 1980).

20/ X. v. Switzerland, 13 Dec. and Rep. 81 (9 May 1978).

21/ Sporrong Lönnroth case, 52 Series A (23 Sept. 1982).

22/ Appl. No. 8223/78, 2 Digest of Strasbourg Case Law 49, 94 (July 1979) (unpublished).

23/ Bock case, 150 Series A (29 Mar. 1989); H. v. United Kingdom, 120 Series A (8 July 1987); X. v. Sweden, 2 Y.B. 354 (30 June 1959).

24/ Feldbrugge case, 99 Series A (29 May 1986).

25/ Case of Ettl and others, 117 Series A (23 Apr. 1987); Erkner and Hofauer case, 117 Series A (23 Apr. 1987); Poiss case, 117 Series A (23 Apr. 1987).

26/ Zimmermann and Steiner case, 66 Series A (13 July 1983); Lithgow case, 102 Series A (8 July 1986); Adler v. Switzerland, 32 Dec. and Rep. 228 (3 Mar. 1983).

27/ Axen case, 72 Series A (8 Dec. 1983).

28/ X. v. Belgium, 24 Dec. and Rep. 198, 202 (10 Mar. 1981).

29/ Zand v. Austria, supra, at 76.

30/ Buchholz case, 42 Series A 15, para. 46 (6 May 1981).

31/ Golder case, supra, at 13, para. 27.

32/ Id. at 10, para. 21.

33/ Isop case, supra, at 122.

34/ Winterwerp case, supra.

35/ Kaplan v. United Kingdom, supra, at 25, para. 138.

36/ X. v. Switzerland, 13 Dec. and Rep. 81, 82 (9 May 1978).

37/ Bock case, supra.

38/ X. v. Sweden, 2 Y.B. 354 (30 June 1959).

39/ H. v. United Kingdom, 120 Series A (8 July 1987).

40/ Feldbrugge case, supra.

41/ Case of Ettl and others, supra; Erkner and Hofauer case, supra, Poiss case, supra.

42/ Zimmermann and Steiner case, supra, at 10, para. 22.

43/ Lithgow case, supra, at 70, para. 192.

44/ Adler v. Switzerland, supra, at 229.

45/ Axen case, supra.

46/ The list is not exhaustive and does not represent all the case law where the European Court and Commission have found that a dispute does not involve "civil rights and obligations".

47/ X. v. Austria, 43 Coll. Dec. 69 (5 Oct. 1972).

48/ X. v. United Kingdom, 9 Dec. and Rep. 224 (19 May 1977); X. v. Sweden, 2 Y.B. 354, 372 (30 June 1959).

49/ Neumeister v. Austria, 6 Series B 22 (27 May 1966).

50/ X. v. Federal Republic of Germany, 43 Coll. Dec. 28 (5 Oct. 1972).

51/ Twenty-One Detained Persons v. Federal Republic of Germany, 27 Coll. Dec. 97 (6 Apr. 1978).

52/ X. v. Austria, 8 Coll. Dec. 9 (19 Sept. 1961).

53/ X. v. Belgium, 8 Y.B. 282 (1 Oct. 1985).

54/ X. v. Austria, 21 Dec. and Rep. 246 (13 Mar. 1980).

55/ X. v. Denmark, 5 Dec. and Rep. 157 (8 Mar. 1976).

56/ X. v. Switzerland, 20 Dec. and Rep. 161 (9 July 1980).

57/ Church of X v. United Kingdom, 12 Y.B. 306 (17 Dec. 1978).

58/ Appl. No. 7706, 2 Digest of Strasbourg Case Law 79 (5 Oct. 1977) (unpublished).

59/ S. v. Federal Republic of Germany, 39 Dec. and Rep. 237 (5 July 1984); X. v. United Kingdom, 21 Dec. and Rep. 168 (8 Oct. 1980).

60/ X. v. Austria, 43 Coll, Dec. 69, 70 (5 Oct. 1972).

61/ Uppal et al. v. United Kingdom, 17 Dec. and Rep. 149 (2 May 1979); Agee v. United Kingdom, 7 Dec. and Rep. 164 (17 Dec. 1976).

62/ Neumeister case, supra, at 83.

63/ X. v. Federal Republic of Germany, 43 Coll, Dec. 28, 34, para. 2 (5 Oct. 1972).

64/ Twenty-One Detained Persons v. Federal Republic of Germany, supra, at 116.

65/ X. v. Austria, 8 Coll. Dec. 9, 10-11 (19 Sept. 1961).

66/ X. v. Belgium, 8 Y.B. 282, 312 (1 Oct. 1985).

67/ X. v. Austria, 21 Dec. and Rep. 246, 247 (13 Mar. 1980).

68/ X. v. Denmark, 5 Dec. and Rep. 157, 158-159 (8 Mar. 1976).

69/ See also König case, 25 Series B 42 (14 Dec. 1976); X. v. United Kingdom, 21 Dec. and Rep. 169 (8 Oct. 1980); X. v. Italy, 21 Dec. and Rep. 208 (10 Oct. 1980).

70/ X. v. Switzerland, 20 Dec. and Rep. 161, 162 (9 July 1980).

71/ Church of X case, 12 Y.B. 306, 316 (17 Dec. 1978).

72/ Eckle case, 51 Series A (15 July 1982).

73/ Engel and others v. the Netherlands, 22 Series A 83-84 (8 June 1986) [hereinafter the Engle case].

74/ X. v. Federal Republic of Germany, 6 Coll. Dec. 29 (26 May 1961).

75/ Engel case, supra.

76/ Engel case, supra; Weber case, 177 Series A (22 May 1990).

77/ Id. at 34, para. 81.

78/ Engel case, supra.

79/ Campbell and Fell case, 80 Series A (28 June 1984).

80/ Campbell and Fell case, supra, at 35, para. 68.

81/ Id. at 36, para. 71.

82/ Oztürk case, 73 Series A (2 Feb. 1984).

83/ E.g., Albert and Le Compte v Belgium, supra.

84/ X. v. Belgium, 20 Dec. and Rep. 40 (5 May 1980).

85/ X. v. Federal Republic of Germany, 39 Dec. and Rep. 237 (5 July 1984); X. v. United Kingdom, 21 Dec. and Rep. 168 (8 Oct. 1980); X. v. Italy, 21 Dec. and Rep. 246 (12 Mar. 1980).

86/ Engel case, supra.

87/ X. v. Austria, 43 Coll. Dec. 69 (5 Oct. 1972).

88/ Neumeister case, 14 Coll. Dec. 38 (6 July 1964).

89/ Id.

90/ Freda v. Italy, 21 Dec. and Rep. 250 (7 Oct. 1980).

91/ Id. at 257, para. 5.

92/ Kamma v. the Netherlands, 15 Y.B. 398 (30 May 1972).

93/ X. v. Belgium, 9 Dec. and Rep. 169, 173 (9 May 1977); Ofner v. Austria, 3 Y.B. 322, 344 (19 Dec. 1960).

94/ Ofner v. Austria, 3 Y.B. 322, 344 (19 Dec. 1960).

95/ X. v. Belgium 5 Y.B. 168 (12 Mar. 1962).

96/ Nielsen case, 4 Y.B. 490 (15 Mar. 1961).

97/ Nielsen case, supra, at 536-37.

98/ X. v. Austria, 2 Dec. and Rep. 68 (1973).

99/ Id.

100/ Kamasinski case, 168 Series A (19 Dec. 1989).

101/ Brozicek case, 167 Series A (19 Dec. 1989).

102/ X. v. the Netherlands, 5 Y.B. 262, 268-270 (23 Nov. 1962).

103/ König case, supra.

104/ Moreira de Azevedo case, 189 Series A 19, para. 74 (23 Oct. 1990).

105/ Wemhoff case, 6 Series A 26, para. 18 (27 June 1968); Stögmüller case, 9 Series A 44, para. 5 (10 Nov. 1969).

106/ Obermeier v. Austria, 179 Series A (28 June 1990).

107/ Köplinger v. Austria, 12 Y.B. 484.

108/ Wemhoff case, supra, at 26; see also Stögmüller case, supra.

109/ Brogan case, 145 Series A, 32, para. 59 (29 Nov. 1988).

110/ Id. at 32, para. 58.

111/ Id. at 33, para. 61.

112/ Id. at 33, para. 62.

113/ Matznetter case, 10 Series A 34-35 (10 Nov. 1969); Vallon case, 95 Series A 19 (3 June 1985).

114/ Neumeister case, 7 Series A 41 (27 June 1968); Deweer case, 35 Series A 22 (27 Feb. 1980).

115/ Neumeister case, 6 Series B 81; X. v. the Netherlands, 27 Dec. and Rep. 233, 237 (11 Dec. 1981).

116/ Neumeister case, supra, (6 Series B).

117/ Deweer case, supra, at 24.

118/ Eckle case, 51 Series A 33 (15 July 1982).

119/ Ringeisen case, supra, at 45.

120/ Eckle case, supra.

121/ Wemhoff case, supra, at 26, para. 18.

122/ Vallon case, supra, at 22-23.

123/ Neubeck v. Federal Republic of Germany, 41 Dec. and Rep. 13, 34 (12 Dec. 1983); H. v. Federal Republic of Germany, 41 Dec. and Rep. 252, 254 (13 Dec. 1984).

124/ Erkner and Hofauer case, 117 Series A (23 April 1987).

125/ In the Martins Moreira case, the European Court held the starting point for determination of "reasonable time" to be the day the Portuguese declaration accepting the right of individual petition took effect. (143 Series A 16, para. 43 (26 Oct. 1988).) See also Golder case, in which the European Court found that it is conceivable that "reasonable time" may begin to run even before the issue of a writ commencing proceedings before a court, under certain circumstances. Golder case, supra, at 15, para. 32.

126/ Guincho case, 81 Series A 31, para. 29 (10 July 1984).

127/ Lithgow case, 102 Series A 72, 120 (8 July 1986).

128/ Dec. Adm. Com. Appl. 3168/67 (5 Apr. 1968) (unpublished); see also Zimmermann and Steiner case, 66 Series A 24 (13 July 1983).

129/ Deumeland case, 100 Series A 29-30, para. 90 (29 May 1986).

130/ Neumeister case, supra.

131/ Bock case, 150 Series A (29 Mar. 1983).

132/ Neumeister case, supra; see also Union Alimentaria Sanders SA case, 157 Series A (7 July 1989).

133/ Buchholz case, 42 Series A (6 May 1981).

134/ Milasi v. Italy, 119 Series A (25 June 1987).

135/ Erkner and Hofauer case, 117 Series A (23 Apr. 1987).

136/ Id. at 62, para. 67.

137/ Id. at 63, para. 69.

138/ See also Poiss case, 117 Series A (23 Apr. 1987).

139/ Union Alimentaria Sanders SA Case, supra, at 13, para. 35.

140/ Buchholz case, supra.

141/ Lechner and Hess case, 118 Series A 19 (23 Apr. 1987).

142/ Moreira de Azevedo case, supra, at 18, para. 72 (23 Oct. 1990); see also Guincho case, 81 Series A 15, para. 34 (10 July 1984).

143/ Eckle case, supra, at 36.

144/ Vernillo case, 198 Series A (20 Feb. 1991).

145/ Id. at para. 38.

146/ Buchholz case, supra.

147/ Milasi case, supra.

148/ Zimmermann and Steiner case, 66 Series A 12-13, para. 29 (13 July 1983).

149/ Neubeck v. Federal Republic of Germany, supra, at 32-33.

150/ Marijnissen v. the Netherlands, 40 Dec. and Rep. 83, 93 (12 Mar. 1984).

151/ Guincho case, 81 Series A 16, para. 38 (10 July 1984).

152/ Id.; see also Milasi case, supra.

153/ Guincho case, supra, at 17, para. 41.

154/ Foti case, 56 Series A (10 Dec. 1982).

155/ Effective remedial action by a Government may lead to a different result. See Zimmermann and Steiner case, supra.

156/ Buchholz case, supra.

157/ Eckle case, supra.

158/ The length of time to be examined amounted to 17 years in the proceedings instigated in Trier, and 10 years in the proceedings in Cologne.

159/ Id. at 37, para. 84.

160/ Id. at 38, para. 85.

161/ Zimmermann and Steiner case, supra.

162/ Id. at 12, para. 29.

163/ Id. at 13, para. 31.

164/ Marijnissen, supra, at 93.

165/ Martins Moreira case, 143 Series A (26 Oct. 1988).

166/ Id. at 17, para. 46; see also Baraona case, 122 Series A 19, para. 4 (8 July 1987).

167/ Id. at 19, para. 54.

168/ Id. at 19, para. 54.

169/ Id. at 58, para. 20.

170/ Id. at 21, para. 60.

171/ Buchholz case, supra, at 16, para. 50.

172/ Bock case, supra.

173/ Id. at 22, para. 47.

174/ Id. at 22, para. 47.

175/ Id. at 23, para. 48.

176/ H. v. United Kingdom, 120 Series A 62-63 (8 July 1987).

177/ Ensslin, Baader and Raspe v. Federal Republic of Germany, 14 Dec. and Rep. 64 (8 July 1978).

178/ Campbell and Fell case, supra.

179/ The European Court and Commission have found that counsel is not necessary when an appellate court will be basing its decision on the trial record or when the appeal is merely on points of law.

180/ W. v. Switzerland, 33 Dec. and Rep. 21 (13 July 1983). The Swiss Government had appointed a lawyer for the defendant but the lawyer had not intervened during the investigation stage. The European Commission stated that the lawyer should have intervened, but found no violation because the defendant did not complain to the authorities.

181/ G. v. United Kingdom, 35 Dec. and Rep. 75 (13 Oct. 1983).

182/ M. v. United Kingdom, 36 Dec. and Rep. 155 (15 July 1983).

183/ Golder case, 18 Series A (21 Feb. 1975); Silver and others v. United Kingdom, 51 Series B (11 Oct. 1980).

184/ X. v. Federal Republic of Germany, 5 Y.B. 104 (6 Mar. 1962). The Commission did not give any facts regarding the German court's refusal to allow the defendant's chosen lawyer to represent him.

185/ Ensslin, Baader and Raspe v. Federal Republic of Germany, supra. German law limited the number of counsel who could appear in court on behalf of a single client. The Commission noted that an average of 10 lawyers represented the defendants during the trial.

186/ Id.

187/ X. v. United Kingdom, 15 Dec. and Rep. 242 (9 Oct. 1978). A British court refused to permit a lawyer representing his father to appear in court because the United Kingdom's Professional Conduct Committee of the Bar Senate had announced that such representation would be improper.

188/ Ensslin, Baader and Raspe v. Federal Republic of Germany, supra.

189/ Appl. No. 6298/73, 2 Strasbourg Digest of Case Law 831 (21 Mar. 1975) (unpublished).

190/ X. and Y. v. Federal Republic of Germany, 42 Coll. Dec. 139 (20 July 1972).

191/ Pakelli case, 64 Series A (25 Apr. 1983).

192/ X. v. Norway, 3 Dec. and Rep. 43 (30 May 1975).

193/ X. v. Austria, 11 Y.B. 322 (19 July 1968).

194/ Appl. No. 9164/80, 2 Strasbourg Digest of Case Law 816 (5 May 1981) (unpublished).

195/ X. v. Norway, 3 Dec. and Rep. 43 (30 May 1975).

196/ S. v. Switzerland, 220 Series A (28 Nov. 1991); X. v. Austria, 6 Y.B. 194 (19 June 1963).

197/ M. v. United Kingdom, 36 Dec. and Rep. 155 (15 July 1983).

198/ Kurup v. Denmark, 42 Dec. and Rep. 287 (10 July 1985).

199/ Appl. No. 9127/80, 2 Strasbourg Digest of Case Law 846 (6 Oct. 1981) (unpublished).

200/ Artico case, 37 Series A (13 May 1980).

201/ Artico case, 34 Series B (Op. Com. 8 Mar. 1979).

202/ Goddi case, supra.

203/ Kamasinski case, supra.

204/ Appl. No. 9127/80, 2 Strasbourg Digest of Case Law 846 (6 Oct. 1981) (unpublished).

205/ Artico case, 37 Series A (13 May 1980).

206/ Pakelli case, supra.

207/ Artico case, supra, 37 Series A.

208/ X. v. Federal Republic of Germany, 28 Dec. and Rep. 229 (6 May 1982).

209/ Artico case, supra, 37 Series A.

210/ Pakelli case, supra.

211/ Id. at 18, 39.

212/ Granger v. United Kingdom, 174 Series A (28 Mar. 1990).

213/ Appl. No. 3212/67, 2 Strasbourg Digest of Case Law 855 (1 Apr. 1968) (unpublished); Appl. No. 2591/65, 2 Strasbourg Digest of Case Law 855 (6 Feb. 1968) (unpublished).

214/ Brown v. United Kingdom, 42 Dec. and Rep. 269 (7 Mar. 1985).

215/ Appl. No. 3049/67, 2 Digest of Strasbourg Case Law 855 (15 July 1968) (unpublished); Appl. No. 2703/66, 2 Strasbourg Digest of Case Law 854 (3 April 1967) (unpublished); Appl. No. 7300/75, 2 Digest of Strasbourg Case Law (13 Dec. 1976) (unpublished).

216/ Appl. No. 3075/67, 11 Y.B. 466 (19 July 1968).

217/ X. v. Federal Republic of Germany, 6 Dec. and Rep. 114 (6 July 1976); X. v. Austria, 36 Coll. 79 (17 Dec. 1970); Appl. No. 646/59, 3 Y.B. 272 (June 1960).

218/ Appl. No. 6946/75, 6 Dec. and Rep. 114 (6 July 1976).

219/ Quaranta case, 205 Series A (24 May 1991).

220/ Id. para. 34.

221/ Bonzi v. Switzerland, 12 Dec. and Rep. 185 (12 July 1978).

222/ X. v. Austria, 22 Coll. Dec. 96 (11 Feb. 1967).

223/ Eckle case, supra; S. v. Switzerland, supra; X. v. Austria, 24 Coll Dec. 20 (1 June 1967).

224/ X. and Y. v. Austria, 15 Dec. and Rep. 160 (12 Oct. 1978).

225/ Id.

226/ Ofner v. Austria, supra.

227/ Id.

228/ See also Kamasinski case, supra.

229/ Huber v. Austria, 46 Coll. Dec. 99 (4 and 5 Oct. 1974); X. v. Belgium, 9 Dec. and Rep. 169 (9 May 1977).

230/ X. v. Belgium, 9 Dec. and Rep. 169, 174 (9 May 1977).

231/ Huber v. Austria, 46 Coll. Dec. 99 (4 and 5 Oct. 1974). The Commission held that two weeks were sufficient preparation time for the defendant to prepare his plea of nullity.

232/ Id.

233/ Köplinger v. Austria, 12 Y.B. 438 (1 Oct. 1968).

234/ X. v. Belgium, 9 Dec. and Rep. 169, 174 (9 May 1977).

235/ X. v. Austria, 15 Dec. and Rep. 160 (12 Oct. 1978).

236/ Id. at 16.

237/ Dec. Adm. Com. Ap. 4965/71, 2 Digest of Strasbourg Case Law 787 (9 Feb. 1972) (unpublished).

238/ Ofner v. Austria, supra.

239/ X. v. Austria, 22 Dec. and Rep. 96 (11 Feb. 1967).

240/ The European Commission also noted that the defendant himself had three months to prepare for the trial.

241/ Failing to provide an attorney to the defendant violates both articles 6 (3) (b) and 6 (3) (c), which states that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Campbell and Fell case, supra.

242/ Ross v. United Kingdom, 50 Dec. and Rep. 179, 183 (11 Dec. 1986).

243/ Campbell and Fell, supra.

244/ Id.

245/ Kröcher and Möller v. Switzerland, 26 Dec. and Rep. 24, 52-53 (9 July 1981).

246/ Id.

247/ Id.

248/ Bonzi v. Switzerland, supra.

249/ Id. at 190.

250/ Kurup v. Denmark, supra.

251/ Ross v. United Kingdom, supra.

252/ X. v. Austria, 9 Dec. and Rep. 50 (5 July 1977); Appl. No. 2435/65, 2 Digest of Strasbourg Case Law 805 (17 Dec. 1966) (unpublished).

253/ Jespers v. Belgium, 27 Dec. and Rep. 61 (14 Dec. 1981).

254/ Id.

255/ X. v. United Kingdom, 42 Coll. Dec. 99 (12 July 1972).

256/ Haase v. Federal Republic of Germany, 11 Dec. and Rep. 78 (12 July 1977).

257/ Isop v. Austria, 5 Y.B. 108 (8 Mar. 1962). Austrian law recognizes the Slovene and Croat languages as official languages for certain districts in Austria. The plaintiff in this case submitted his petition to a court that was not in one of these districts.

258/ X. and Y. v. Belgium, 9 Y.B. 418, 20 Coll. Dec. 8 (7 Oct. 1966).

259/ Kamasinski case, supra.

260/ Delcourt v. Belgium, 10 Y.B. 282 (6 April 1967).

261/ Kamasinski case, supra.

262/ Luedicke, Belkacem and Koc case, 29 Series A (28 Nov. 1978).

263/ Kamasinski case, supra.

264/ X. v. Austria, 2 Dec. and Rep. 68 (29 May 1975).

265/ Id.

266/ Oztürk case, supra.

267/ Luedicke, Belkacem and Kos case, supra.

268/ 23 Inhabitants of Alsemberg and Beersel v. Belgium, 6 Y.B. 332 (26 July 1963). The French-speaking applicants complained that the local Flemish-language schools refused to provide an education in French to the French-speaking students.

269/ Le Compte, Van Leuven and De Meyere case, 43 Series A 24, para. 55 (23 June 1981) [hereinafter Le Compte case]; see also Sramek case, 84 Series A 17, para. 36 (22 Oct. 1984).

270/ Sramek case, supra, at 17, para. 36.

271/ Zand v. Austria, 15 Dec. and Rep. 70, 81 (12 Oct. 1978).

272/ Le Compte case, supra, at 24, para. 57.

273/ Piersack case, 53 Series A 13, para. 27 (1 Oct. 1982); see also Belilos case, 132 Series A 29, para. 64.

274/ Delcourt case, 11 Series A (17 Jan. 1970).

275/ Borgers v. Belgium, 214-A Series A (30 Oct. 1991).

276/ Lithgow case, supra.

277/ Id. at 71.

278/ Ettl. v. Austria case, 117 Series A (3 Apr. 1987).

279/ In the Sramek case, however, the local government was party in the dispute.

280/ Additional factors in the European Court's decision were the length of the terms of office for the members (five years) and their virtual irremovability during that period.

281/ Sramek case, supra, at 18, para. 37.

282/ Id. at 42, para. 20.

283/ Zand v. Austria, supra, at 81-82; Le Compte case, 38 Series B 40; Engel case, supra, at 27-28.

284/ Zand v. Austria, supra.

285/ Id.

286/ Sutter v. Switzerland, 16 Dec. and Rep. 166 (1 May 1979).

287/ Campbell and Fell case, supra.

288/ The European Court also took other factors into consideration when reaching its decision, such as manner of appointment of members.

289/ In Zand v. Austria, supra, at 82, para. 80, the European Commission stated that although the Austrian minister could abolish the labour courts at his discretion, the irremovability of judges was guaranteed by the Austrian Constitution. The applicant had not succeeded in showing that the Government had violated that policy.

290/ Sutter case, supra.

291/ X. v. Sweden, 43 Coll. Dec. 71 (8 Feb. 1973).

292/ Id. at 79, para. 3.

293/ Belilos case, 132 Series A (29 Apr. 1988).

294/ Id. at 30, para. 67.

295/ Delcourt case, supra.

296/ Hauschildt case, 154 Series A, at 21, para. 48 (24 May 1989).

297/ Piersack case, supra, at 14, para. 30.

298/ Sramek case, supra, at 19-20; De Cubber case, 86 Series A 13-16 (26 Oct. 1984); Campbell and Fell case, supra, at 39-40.

299/ Hauschildt case, supra.

300/ Piersack case, supra.

301/ Id. at 14, para. 30.

302/ Id. at 15, para. 30.

303/ Id. at 15, para. 31.

304/ De Cubber case, supra, at 15, para. 29.

305/ As an investigatory judge in the case, the trial judge would have acquired detailed knowledge of the case, which might have influenced him or her.

306/ Id. at 16, para. 30.

307/ Ben Yaacoub case, 127 Series A (27 Nov. 1987). (The case was settled in the European Court.)

308/ Id. at 14, para. 109.

309/ Hauschildt case, supra, at 22, para. 50.

310/ Gillow case, 109 Series A (24 Nov. 1986).

311/ Ben Yaacoub case, supra, at 11, para. 96.

312/ De Cubber case, supra; Le Compte case, supra, at 25; Albert and Le Compte case, supra, at 17-18; Campbell and Fell case, supra, at 41.

313/ Le Compte case, supra.

314/ Le Compte case, supra, at 25, para. 58.

315/ Ringeisen case, supra, at 13, para. 97.

316/ Piersack case, supra, at 14-15, para. 30.

317/ Sramek case, supra, at 17, para. 36.

318/ Zand v. Austria, supra, at 79.

319/ Zand v. Austria, supra.

320/ X. and Y. v. Ireland, 22 Dec. and Rep. 51, 72-73 (10 Oct. 1980).

321/ X. v. Federal Republic of Germany, 4 Y.B. 346 (19 Sept. 1961).

322/ X. v. Belgium, 4 Y.B. 378 (19 Dec. 1961).

323/ Hopfinger v. Austria, 3 Y.B. 370, (19 Dec. 1960).

324/ Bricmont case, 158 Series A 31, para. 89 (7 July 1989). The defenc had not applied to have evidence heard by one witness, and another witness ha died.

325/ X. v. Austria, 44 Coll. Dec. 126 (9 July 1973); X. v. United Kingdom, 43 Coll. Dec. 151 (6 Apr. 1973); X. v. Federal Republic of Germany, 37 Coll. Dec. 119 (1 Apr. 1970).

326/ Id. at 135.

327/ Engel case, supra.

328/ Ekbatani v. Sweden, 44 Dec. and Rep. 113 (5 July 1985); X. v. Federal Republic of Germany, 35 Coll. Dec. 132 (13 July 1970).

329/ X. v. Federal Republic of Germany, 35 Coll. Dec. 127 (21 July 1970).

330/ X. v. Federal Republic of Germany, 35 Coll. Dec. 4 (21 July 1970).

331/ X. v. Federal Republic of Germany, 35 Coll. Dec. 132 (13 July 1970).

332/ X. v. Austria, 45 Coll. Dec. 59 (31 May 1973).

333/ X. v. Austria, 8 Y.B. 174 (15 Feb. 1965).

334/ X. v. Austria, 11 Coll. Dec. (23 July 1963).

335/ X. and Germany Association of Z. v. Federal Republic of Germany, 6 Y.B. 204 (16 Dec. 1963).

336/ X. v. United Kingdom, 43 Coll. Dec. 85 (14 Dec. 1972).

337/ X. v. Switzerland, 28 Dec. and Rep. 127 (11 Mar. 1982).

338/ X. v. Austria, 45 Coll. Dec. 59 (31 May 1973).

339/ X. v. Switzerland, 28 Dec. and Rep. 127, 136 (11 Mar. 1982).

340/ X. v. United Kingdom, 43 Coll. Dec. 85 (14 Dec. 1972).

341/ Bricmont case, supra; see also X. v. Denmark, 27 Dec. and Rep. (16 Dec. 1981).

342/ Bricmont case, supra.

343/ Kurup v. Denmark, supra; X. v. Denmark, 27 Dec. and Rep. (16 Dec. 1981).

344/ X. v. Federal Republic of Germany, 17 Dec. and Rep. 231 (4 July 1979).

345/ Schertenleib v. Switzerland, 17 Dec. and Rep. 180 (12 July 1979).

346/ X. v. Federal Republic of Germany, 1 Dec. and Rep. 84 (19 Dec. 1974).

347/ Asch case, 203 Series A (26 Apr. 1991).

348/ X. v. Austria, 40 Coll. 1 (1 June 1972).

349/ Kostovski case, 166 Series A (20 Nov. 1989); Windisch case, 186 Series A (27 Sept. 1990).

350/ Windisch case, supra, para. 30 (27 Sept. 1990).

351/ Kostovski case, supra, at 20, para. 41; see also Delta case, 191 Series A 15, para. 35 (19 Dec. 1990).

352/ Id.

353/ Id.

354/ Id. at 20, para. 42.

355/ Id. at 20, para. 43.

356/ Windisch case, supra.

357/ Id. at 10, para. 28.

358/ Id. at 11, para. 28.

359/ Asch case, supra.

360/ Id. at para. 31.

361/ S. v. Federal Republic of Germany, 39 Dec. and Rep. 43 (13 Dec. 1983).

362/ Isgrò case, 194-A Series A (19 Feb. 1991).

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366/ X. v. Federal Republic of Germany, 35 Coll. Dec. 121 (14 July 1970).

367/ Id.

368/ Bideault v. France, 48 Dec. and Rep. 232 (6 Oct. 1986).

369/ Bönisch case, 92 Series A (6 May 1985).

370/ Lutz case, 123 Series A (25 Aug. 1987); Minelli case, 62 Series A (25 Mar. 1983); Lingens and Leitgeb v. Austria, 26 Dec. and Rep. 171 (11 Dec. 1982).

371/ Minelli case, supra.

372/ Id.

373/ Engel case, supra, at 38, para. 90.

374/ X. v. Austria, 19 Coll. Dec. 95 (1 Apr. 1966).

375/ X. v. Austria, 23 Coll. Dec. 31 (3 Apr. 1967); X. v. Austria, 19 Coll. Dec. 95 (1 Apr. 1966); X. v. Denmark, 17 Coll. Dec. 44 (14 Dec. 1965).

376/ Krause v. Switzerland, 13 Dec. and Rep. 73 (3 Oct. 1978).

377/ In an early case the European Commission declared that the presumption of innocence is binding only on judges [Ensslin, Baader and Raspe v. Federal Republic of Germany, 14 Dec. and Rep. 64 (8 July 1978)] but that decision has since been overturned [Krause v. Switzerland, 13 Dec. and Rep. 73 (3 Oct. 1978)].

378/ X. v. Austria, 30 Dec. and Rep. 227 (6 Oct. 1982).

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* Deleted for technical reasons.

379/ Ensslin, Baader and Raspe v. Federal Republic of Germany, supra.

380/ Krause v. Switzerland, supra.

381/ Id.

382/ R.F. and S.F. v. Austria, 44 Dec. and Rep. 238 (7 Oct. 1985).

383/ Bricmont v. Belgium, 48 Dec. and Rep. 106 (15 July 1986).

384/ Mr. and Mrs. X. v. United Kingdom, 45 Coll. Dec. 1, 12-13 (18 July 1973).

385/ X. v. the Netherlands, 16 Dec. and Rep. 184 (4 Dec. 1978).

386/ Novelli v. Italy, 45 Dec. and Rep. 263 (5 Dec. 1985); Farragut v. France, 39 Dec. and Rep. 186 (6 July 1984).

387/ C. v. United Kingdom, 47 Dec. and Rep. 85 (12 May 1986).

388/ S. v. Federal Republic of Germany, 39 Dec. and Rep. 43 (13 Dec. 1983).

389/ Salabiaku case, 141 Series A 15, para. 28 (7 Oct. 1988).

390/ Id. at 16, para. 28.

391/ X. v. United Kingdom, 42 Coll. Dec. 135 (19 July 1972).

392/ Id.

393/ Salabiaku case, supra.

394/ Minelli case, supra, at 18, para. 37-38.

395/ Id.

396/ Id.

393/ bis I. and C. v. Switzerland, 48 Dec. and Rep. 35 (4 Dec. 1985).

394/ bis Id. at 45.

395/ bis Lutz case, supra, at 25, para. 59.

396/ bis Minelli case, supra, at 17, para. 34-35.

397/ Lutz case, supra.

398/ The Minelli case involved a defendant who was asked to pay part of the expenses of the prosecution, while in the Lutz case, the defendant was merely refused reimbursement of his own costs for defence. The European Court did not consider the difference significant.

399/ X. v. Austria, 36 Coll. Dec. 79 (17 Dec. 1970). Police had arrested the applicant for burglary and had seized the cash in his possession. The Commission found the application inadmissible.

400/ C. Family v. Switzerland, 35 Dec. and Rep. 98 (16 Dec. 1983).

401/ Engel case, supra, at 89, para. 37.

402/ Engel case, supra; X. v. Austria, 35 Coll. Dec. 109 (21 July 1970).

403/ Sutter case, supra, at 12, para. 26; Axen case, 72 Series A 24 (8 Dec. 1983).

404/ Sutter case, supra, at 12, para. 26; Axen case, supra.

405/ Appl. No. 8512/79, 2 Digest of Strasbourg Case Law 426, 444 (2 Oct. 1979).

406/ Axen case, supra, at 12, para. 26.

407/ Le Compte case, supra; Albert and Le Compte case, supra, at 18.

408/ Campbell and Fell case, supra.

409/ Id. at 42, para. 87.

410/ Id. at 42, para. 88.

411/ Le Compte case, supra.

412/ Le Compte case, supra, at 25, para. 59.

413/ 1913/63 v. Austria, 2 Digest of Strasbourg Case Law 438 (30 Apr. 1965) (unpublished).

414/ X. v. Norway, 35 Coll. Dec. 37, 50 (16 July 1970).

415/ Axen case, 57 Series B 24-25.

416/ Adler v. Switzerland, 32 Dec. and Rep. 228 (3 Mar. 1983).

417/ Albert and Le Compte case, supra.

418/ Axen case, supra.

419/ Albert and Le Compte case, supra.

420/ Axen case, supra, at 12-13; Sutter case, supra, at 13.

421/ Id.

422/ Sutter case, supra, at 13, para. 30

423/ Axen case, supra.

424/ Axen case, supra, at 12, para. 28

425/ Ekbatani case, supra, at 14, para. 31

426/ Strupport v. Federal Republic of Germany, 27 Coll. Dec. 61 (16 July 1992)

427/ X. v. United Kingdom, 36 Coll. Dec. 61 (13 July 1970)

428/ H. v. Belgium, 127 Series A 36, para. 54 (30 Nov. 1987)

429/ Albert and Le Compte case, supra.

430/ Le Compte case, supra, at 25-26.

431/ Håkansson and Sturesson case, 171 Series A (21 Feb. 1990)

432/ Id.

433/ Id. at 20, para. 67

434/ Adler v. Switzerland, supra; see also H. v. Belgium 127 Series A (30 Nov. 1987).

435/ Id.

436/ Nielsen case, 4 Y.B. 490, 548 (15 Mar. 1961)

437/ Artico case, supra, 37 Series A.

438/ Delcourt v. Belgium, 11 Series A (17 January 1970): "[T]he right to a fair administration of justice holds such a prominent place in a democratic society that a restrictive interpretation of arricle 6 (1) would not correspond to the aim and purpose of that provision."

439/ Nielsen case, supra, at 548.

440/ Can v. Austria, 79 Series B 23-24, para. 48 (12 July 1984).

441/ Nielsen case, supra, at 548.

442/ Pakelli case, supra.

443/ X. v. United Kingdom, 9 Dec. and Rep. 100 (16 May 1977).

444/ Decision of the Committee of Ministers, Resolution relating to cases of Ofner and Hopfinger (5 Apr. 1963), 6. Y.B. 708, 710.

445/ Bönisch case, supra, at 15-16, para. 32-5.

446/ Id. at 16, para. 35.

447/ Albert and Le Compte case, supra.

448/ Branstetter case, 211 Series A (28 Aug. 1991).

449/ Id. at para. 41.

450/ The European Court noted that article 6 (3) (d) literally relates to witnesses and not experts, and it further held that the expert could not be regarded as a witness for the prosecution.

451/ Id. at para. 44.

452/ Barberà, Messeguè and Jabardo case, 146 Series A (6 Dec. 1988).

453/ Id. at 31, para. 70.

454/ Id. at 33, para. 78.

455/ Id, at 36-37, para. 87.

456/ X. v. Sweden, 2. Y.B. 354, 372-274 (30 June 1959).

457/ Colozza case, 89 Series A 14, para. 27 (12 Feb. 1985); see also Rubinat case, 89 Series A (12 Feb. 1985).

458/ Article 6 (3) (c), (d), and (e): the right to defend oneself in person or through counsel; the right to examine witnesses; the right to an interpreter.

459/ Monnell and Morris case, 115 Series A 22, para. 58 (2 Mar. 1987).

460/ Monnell and Morris case, supra, at 23, para. 60; and at 41, para. 152 (Opinion of the Commission).

461/ Id. at 23, para. 62.

462/ Id, at 25, para. 68.

463/ Colozza case, supra, at 15, para. 29.

464/ Id, at 16, para. 30

465/ Brozicek case, 167 Series A (19 Dec. 1989).

466/ F.C.B. v. Italy, 208-B Series A (28 Aug. 1991).

467/ Id. at para. 33.

468/ Id. at para. 35.

469/ Colozza case, supra, at 14, paras. 27-28; Brozicek case, supra, at 19, para. 45.

470/ Colozza case, supra, at 14, para. 28; Neumeister case, 17 Series A 16, para. 36 (7 May 1974).

471/ X. v. Sweden, 2. Y.B. 354, 370 (30 June 1959).

472/ Ofner v. Austria, 3. Y.B. 322, 332 (19 Dec. 1960).

473/ Feldbrugge case, 99 Series A (29 May 1986).

474/ Id. at 17, para. 44.

475/ Id. at 18, paras. 45-46.

476/ Schenk case, 140 Series A 29, para. 46 (12 July 1988); see also Delta case, supra, at 15, para. 36 (19 Dec. 1990).

477/ Barberà, Messegué and Jabardo case, supra, at 31, para. 68.

478/ Delta case, supra.

479/ Id. at 16, para. 36.

480/ Id.

481/ Schenk case, supra.

482/ Schenk case, supra, at 30, para. 49.

483/ Id. at 33.

484/ Bricmont case, supra.

485/ Id. at 28, para. 76.

486/ Id. at 29. para. 77.

487/ Id. at 30, para. 81.

488/ Olsson case, 130 Series A (24 Mar. 1988).

489/ Delcourt case, supra, at 14-15, para. 25; see also Ekbatani case, supra, at 12, para. 24.

490/ Delcourt case, supra, at 15, para. 26; see also Monnell and Morris case, supra, at 22, para. 56; Pakelli case, supra, at 14, para. 29.

491/ Monnell and Morris case, supra, at 22, para. 56; Ekbatani case, supra, at 13, para. 27.

492/ Ekbatani case, supra, at 13, para. 28.

493/ Id. at 14, para. 30.

494/ Pretto case, 71 Series A 11, para. 21 (8 Dec. 1983).

495/ Id. at 11, para. 22.

496/ Id.

497/ Axen case, 72 Series A 13 (8 Dec. 1983).

498/ Sutter case, supra, at 14.

499/ Campbell and Fell case, supra, at 43, para. 92.

500/ See Case 7505, Inter-Am. C.H.R., 51, 51-55, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986) (resolving that a fair trial was held); Case 9190, Inter-Am. C.H.R., 55, 55-57, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986); Case 9054, Inter-Am. C.H.R., 111, 111-13, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985) (same); Case 7504, Resolution No. 37/83, Inter-Am. C.H.R., OEA/Ser.L/V/II.61, doc. 49 rev. 1 (1983) (same), Case 7604, Inter-Am. C.H.R., 54, 54-57, OEA/Ser.L/V/II.63, doc. 10 rev. 1 (1984) (same), Case 3553, Inter-Am. C.H.R., 99, 99-100, OEA/Ser.L/V/II.61, doc. 22 rev. 1 (1983) (same). The resolutions in these cases are similar to those in cases 3553, 3554, 7506, 7507, 7509 and 7514 which were decided the same year. Id. at 100; Case 3115, Inter-Am. C.H.R., '91 91-93, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982) (same); but see case 9260, Inter-Am. C.H.R., 154, 154-162, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1988) (See para. 505 infra).

501/ American Declaration of the Rights and Duties of Man, adopted 2 May 1948 by the Ninth International Conference of American States, Bogota, Colombia, reprinted in Basic Documents Pertaining to the Inter-American System 17, OEA/Ser.L/V/II.71, doc. 6 rev. 1 (1987).

502/ American Convention on Human Rights, 22 Nov. 1969, O.A.S.T.S. No. 36, at 1, OEA/Ser.L/V/II.23, doc. rev. 6, 1, O.A.S.O.R. OEA/Ser.K/XVI/I.1, doc. 65 rev.1 corr. 2 (1970), reprinted in 9 I.L.M. 673 (1973).

503/ Inter-American Commission on Human Rights: Ten Years of Activities, 1971-1981, at 136-39 (1982).

504/ Id. at 140-41.

505/ Id. at 142-46.

506/ Id. at 167-69.

507/ Id. at 173-76.

508/ Id. at 177-81.

509/ Inter-Am. C.H.R., 87, 87-88, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981).

510/ Inter-Am. C.H.R., 81, 81-83, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

511/ Inter-Am. C.H.R., 113, 113-19, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

512/ Inter-Am. C.H.R., 75, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987).

513/ Case 7864, Inter-Am. C.H.R., 65, 72, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987).

514/ See Status of Human Rights in El Salvador, Inter-Am. C.H.R., 141, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

515/ See Status of Human Rights in El Salvador, Inter-Am. C.H.R., 154, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

516/ Report on the Situation of Human Rights in Paraguay, Inter-Am. C.H.R., 53, OEA/Ser.L/V/II.43, doc. 13 (1978) [hereinafter Paraguay Report 1978].

517/ Report on the Situation of Human Rights in Panama, Inter-Am. C.H.R., 58, OEA/Ser.L/V/II.44, doc. 38 rev. 1 (1978) [hereinafter Panama Report 1978].

518/ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. C.H.R., 100-01, OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983) [hereinafter Report on Miskito Population 1983].

519/ Panama Report 1978 at 58, 62.

520/ Second Report on the Human Rights Situation in Suriname, Inter-Am. C.H.R., 23-24 OEA/Ser.L/V/II.66, doc. 21 rev. 1 (1985) [hereinafter Suriname Report 1985].

521/ Panama Report 1978 at 53.

522/ AG/RES/613 (XII-O/82), Inter-Am. C.H.R., 148, OEA/Ser.L/V/II.61, doc. 22 rev. 1 (1983).

523/ See Report on Miskito Population 1983 at 109.

524/ See Status of Human Rights in Guatemala, Inter-Am. C.H.R., 179-80, OEA/Ser.P/AG/doc.2518/89 (1989).

525/ Paraguay Report 1978 at 53.

526/ Report on the Situation of Human Rights in the Republic of Bolivia, 41 OEA/Ser.L/V/II.53, doc. 6 (1981) [hereinafter Bolivia Report 1981].

527/ Report on Miskito Population 1983 at 104.

528/ Id.

529/ Status of Human Rights in Paraguay, Inter-Am. C.H.R., 150 OEA/Ser.L/V/II.47 doc. 13 rev. 1 (1979).

530/ Status of Human Rights in Uruguay, Inter-Am. C.H.R., 123 OEA/Ser.L/V/II.57 doc. 6 rev. 1 (1982).

531/ Status of Human Rights in Argentina, Inter-Am. C.H.R., 107 OEA/Ser.L/V/II.57 doc. 6 rev. 1 (1982).

532/ Report on the Situation of Human Rights in Nicaragua, Inter-Am. C.H.R., 62 OEA/Ser.L/V/II.45, doc. 16 rev. 1 (1978) [hereinafter Nicaragua Report 1978].

533/ See Status of Human Rights in Guatemala, Inter-Am. C.H.R., 180, OEA/Ser.P/AG/doc.2518/89 (1989).

534/ See Status of Human Rights in Paraguay, Inter-Am. C.H.R., 180, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

535/ See infra notes 646, 705-15 and accompanying text.

536/ *

537/ Report on Miskito Population 1983 at 100.

538/ Paraguay Report 1978 at 68.

539/ See Status of Human Rights in Nicaragua, Inter-Am. C.H.R., 194, OEA/Ser.P/AG/doc.2518/89 (1989).

540/ See Status of Human Rights in El Salvador, Inter-Am. C.H.R., 154, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

541/ Bolivia Report 1981 at 41-42.

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* Deleted for technical reasons.

542/ Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., 48-49, OEA/Ser.L/V/II.77, doc. 18 rev. 1 (1990) [hereinafter Haiti Report 1990].

543/ Suriname Report 1985 at 32.

544/ Bolivia Report 1981 at 44.

545/ Suriname Report 1985 at 33.

546/ Case 9102, Inter-Am. C.H.R., 57, 96-97, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

547/ Velásquez Rodríguez case, Judgement of 29 July, 1988, Inter-Am. C.H.R., 68, OEA/Ser.L/V/III.19, doc. 13 (1988).

548/ Report on the Situation of Human Rights in Panama, Inter-Am. C.H.R., 34-35 OEA/Ser.L/V/II.76, doc. 16 rev. 2 (1989) [hereinafter Panama Report 1989].

549/ Report on the Situation of Human Rights in Uruguay, Inter-Am. C.H.R., 53 OEA/Ser.L/V/II.43 doc. 19 rev. 1 (1978) [hereinafter Uruguay Report 1978].

550/ Suriname Report 1985 at 22.

551/ See Status of Human Rights in Panama, Inter-Am. C.H.R., 486, OEA/Ser.L/V/II.79, doc. 12 rev. 1 (1991).

552/ Suriname Report 1985 at 38.

553/ Report on Miskito Population 1983 at 103.

554/ Activities Connected with Special Tribunals in Nicaragua, Inter-Am. C.H.R., 230, OEA/Ser.P/AG/doc.2518/89 (1989).

555/ Id.

556/ Panama Report 1978 at 58.

557/ Nicaragua Report 1978 at 62.

558/ Paraguay Report 1978 at 55.

559/ See Status of Human Rights in Panama, Inter-Am. C.H.R., 485, OEA/Ser.L/V/II.79, doc. 12 rev. 1 (1991).

560/ Case 3482, Inter-Am. C.H.R., 23, 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981).

561/ Status of Human Rights in Haiti, Inter-Am. C.H.R., 118 OEA/Ser.L/V/II.57 doc. 6 rev. 1 (1982).

562/ See Status of Human Rights in Paraguay, Inter-Am. C.H.R., 170, OEA/Ser.L/V/II.77, doc. 7 rev. 1 (1990).

563/ Situation of Human Rights in Cuba: Seventh Report, Inter-Am. C.H.R., 56, OEA/Ser.L/V/II.61, doc. 29 rev. 1 (1983) [hereinafter Cuba Report 1983]

564/ See e.g., cases cited at note 500, supra.

565/ Cuba Report 1983 at 56. See also Report on the Situation of Human Rights in the Republic of Guatemala, Inter-Am. C.H.R., 67 OEA/Ser.L/V/II.61 doc. 47 rev. 1 (1983) [hereinafter Guatemala Report 1983]; Paraguay Report 1978 at 70, 73; Report on the Situation of Human Rights in Suriname, Inter-Am. C.H.R., 36, OEA/Ser.L/II.61, doc. 6 rev. 1 (1983); Uruguay Report 1978 at 61.

566/ Paraguay Report 1978 at 71.

567/ Suriname Report 1983 at 36.

568/ Paraguay Report 1978 at 72.

569/ Report on the Situation of Human Rights in Argentina, Inter-Am. C.H.R., 223, OEA/Ser.L/V/II.49, doc.19 rev. 1 (1980) [hereinafter Argentina Report 1980].

570/ Guatemala Report 1983 at 91.

571/ Haiti Report 1990 at 49.

572/ Paraguay Report 1978 at 70.

573/ Cuba Report 1983 at 57.

574/ Case 10.198, Inter-Am. C.H.R., 73, 79, OEA/Ser.L/V/II.77, doc. 7 rev. 1 (1990).

575/ Cuba Report 1983 at 56.

576/ Uruguay Report 1978 at 57.

577/ See supra note 546 and accompanying text; see also supra note 566 accompanying text.

578/ See infra footnote 644 and accompanying text.

579/ Case 10.037, Inter-Am. C.H.R., 36, OEA/Ser.P/AG/doc.2518/89 (1989).

580/ Id. at 62 (citing Neumeister case, 7 Series A 41 (27 June 1968) at 83).

581/ Id. at 65.

582/ Report on the Situation of Human Rights in the Republic of Nicaragua, Inter-Am. C.H.R., 105, OEA/Ser.L/V/II.53, doc.25 (1981) [hereinafter Nicaragua Report 1981].

583/ Panama Report 1978 at 59.

584/ See Status of Human Rights in Chile, Inter-Am. C.H.R., 287, OEA/Ser.L/V/II.74, doc. 10 rev. 1 (1988).

585/ Case 10.180, Inter-Am. C.H.R., 237, 240, OEA/Ser.L/V/II.79, doc. 12 rev. 1 (1991).

586/ Id. at 250.

587/ Report on Miskito Population 1983 at 103, 105.

588/ Case 8095, Inter-Am. C.H.R., 34, 37, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

589/ Second Report on the Situation of Political Prisoners and Their Relatives in Cuba, Inter-Am. C.H.R., 7, OEA/Ser.L/V/II.23, doc. 6 rev. 1 (1970) [hereinafter Cuba Report 1970].

590/ Case 10.198, Inter-Am. C.H.R., 73, 79, OEA/Ser.L/V/II.77, doc. 7 rev. 1 (1990).

591/ Id. at 95.

592/ Paraguay Report 1978 at 70.

593/ Guatemala Report 1983 at 91.

594/ Suriname Report 1985 at 30.

595/ Guatemala Report 1983 at 92.

596/ Panama Report 1978 at 57.

597/ Id. at 58.

598/ Cuba Report 1983 at 57.

599/ Guatemala Report 1983 at 91.

600/ Case 4563, Inter-Am. C.H.R., 57, 61, OEA/Ser.L/V/II.63, doc. 10 rev. 1 (1984).

601/ Case 7378, Inter-Am. C.H.R., 60, 63, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981).

602/ Nicaragua Report 1978 at 134.

603/ Uruguay Report 1978 at 52.

604/ See Inter-Am. C.H.R., 193, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

605/ See Status of Human Rights in Paraguay, Inter-Am. C.H.R., 169, OEA/Ser.L/V/II.77, doc. 7 rev. 1 (1990).

606/ Id. at 170.

607/ See Status of Human Rights in Panama, Inter-Am. C.H.R., 495, OEA/Ser.L/V/II.79, doc. 12 rev. 1 (1991).

608/ See Argentina Report 1980 at 221; see also Guatemala Report 1983 at 88.

609/ Panama Report 1989 at 5.

610/ Panama Report 1978 at 72.

611/ See Inter-Am. C.H.R., 182, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

612/ Guatemala Report 1983 at 96.

613/ Nicaragua Report 1978 at 61.

614/ See Status of Human Rights in Paraguay, Inter-Am. C.H.R., 180, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

615/ Paraguay Report 1978 at 72.

616/ Nicaragua Report 1978 at 61.

617/ Guatemala Report 1983 at 93.

618/ Paraguay Report 1978 at 72.

619/ Guatemala Report 1983 at 96.

620/ Nicaragua Report 1981 at 81.

621/ Id.

622/ Id. at 106.

623/ Panama Report 1978 at 59.

624/ Argentina Report 1980 at 224.

625/ Case 9755, Inter-Am. C.H.R., 132, 137, OEA/Ser.L/V/II.74, doc. 10 rev. 1 (1988).

626/ Guatemala Report 1983 at 91.

627/ Cuba Report 1983 at 57.

628/ Guatemala Report 1983 at 95.

629/ Cuba Report 1970 at 5.

630/ Case 9850, Inter-Am. C.H.R., 41, 75, OEA/Ser.L/V/II.79, doc. 12 rev. 1 (1991).

631/ Id. at 76.

632/ Id.

633/ Case 9260, Inter-Am. C.H.R., 154, 162, OEA/Ser.L/V/II.74, doc. 10 rev. 1 (1988).

634/ Nicaragua Report 1978 at 61.

635/ Suriname Report 1985 at 23.

636/ Suriname Report 1983 at 37.

637/ In the matter of Viviana Gallardo et al., Series B, No. G 101/81 (1986).

638/ Id. at 51.

639/ Godinez Cruz case, Preliminary Objections, Inter-Am. C.H.R., 81, 100 OEA/Ser.L/V/III.17 doc. 13, para. 93 (1987).

640/ Godinez Cruz case, Judgement of 20 January 1989, Inter-Am. C.H.R., 14, 100 OAS/Ser.L/V/III.21, doc. 14 (1989)

641/ Id. at 109.

642/ Id.

643/ Id. at 128.

644/ Advisory Opinion of 9 May 1986, Inter-Am. C.H.R., 13 OEA/Ser.L/III.15, doc. 13 (1986).

645/ Id. at 30.

646/ Advisory Opinion of 6 October 1987, Inter-Am. C.H.R. OEA/Ser.L/V/III.19, doc. 13 (1988).

647/ Id. at 19.

648/ Id. at 23.

649/ Id.

650/ Inter-Am. C.H.R., 115 OEA/Ser.L/V/II.54, doc. 9, rev. 1 (1981).

651/ See Status of Human Rights in Chile, Inter-Am. C.H.R., 202, OEA/Ser.L/V/II.71, doc. 9, rev. 1 (1987).

652/ Advisory Opinion OC-8/87, supra, at 34.

653/ Id.

654/ Article XVIII of the American Declaration of the Rights and Duties of Man provides: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

655/ Article 8 of the Universal Declaration of Human Rights provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

656/ Article 2(3) of the International Covenant on Civil and Political Rights provides:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

657/ The provision for amparo in the American Convention provides through article 25:

"Right to Judicial Protection

1. Everyone has the right to a simple and prompt recourse, or any other effective recourse, before a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;

(b) to develop the possibilities of judicial remedy; and

(c) to ensure that the competent authorities shall enforce such remedies when granted."

658/ Hector Fix Zamudio, The Writ of Amparo in Latin America, 13 Lawyer of the Americas 361-66 (1981). Three traditional bases or interpretations of the term amparo exist. First, the term was used as a synonym for "remedy" or means of challenging (recurso o medio de impugnacio) judicial decisions. It first appeared in the Siete Partidas, a compilation ordered by Alfonso the Wise (1221-84), and greatly influenced law in the Spanish-American colonies. Second, the term "amparo" was utilized to designate a kind of injunction (interdictos posesorios), which in the majority of cases, according to Spanish law, would lie to protect real property rights. On occasion amparo was employed to safeguard personal rights as well. The term "interdict amparo" still remains to specify the instrument for maintaining possessory rights over urban or rural properties against dispossession efforts by other private interests. It has been codified in the civil procedure of Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Venezuela. Bolivia and Venezuela permit the remedy to be sought from law enforcement authorities as well as from the courts. The proceeding is known as the "administrative amparo". The third meaning of the amparo relates to its role as a procedural instrument for securing the rights of the individual. Its central importance lies in its potential to enforce individual rights found in the national constitutions of Latin America. Id. at 364-66.

659/ Id.

660/ Id. at 366.

661/ Id.

662/ Id. at 367.

663/ Id.

664/ Sir Udo Udoma, Some Thoughts on World Habeas Corpus, in The Human Right to Individual Freedom: A Symposium on World Habeas Corpus 43 (1970).

665/ John Mandler, "Habeas Corpus and the Protection of Human Rights in Argentina", 16 Yale J. Int'l Law 1 (1991).

666/ Some constitutions provide explicitly for the right to petition for habeas corpus. See, e.g., Constitution of Bolivia, art. 18; Constitution of Costa Rica, art. 48; Constitution of the Dominican Republic, art. 8, sec. 2; Constitution of Ecuador, art. 19, sec. (17j); Constitution of El Salvador, art. 11; Constitution of Guatemala, art. 263; Constitution of India, art. 32(2); Constitution of Panama, art. 22; Constitution of Peru, art. 295; Constitution of the Philippines, art. 4, sec. 15; Constitution of Portugal, art. 31; Constitution of Spain, art. 17(4). Other constitutions provide rights to petition for redress similar to habeas corpus. See, e.g., Constitution of the Bahamas, art. 28 (Article 28 provides that a detained person may apply to the Supreme Court for redress. The court may then issue such writs as necessary for the purpose of enforcement of any provision regarding enumerated fundamental rights.); Constitution of Belize, art. 18 (same as Bahamas); Constitution of Chile, art. 21 (The detained person has the right to appeal to a magistrate; the magistrate may then order the individual to be brought before it.); Constitution of Cyprus, art. 11(7) (The detained person has a right to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court.); Constitution of Ireland, art. 40, sec. 4 (A person may complain that he is unlawfully detained and the High Court may order the person in whose custody such person is detained to produce the body of such a person before the High Court.); Constitution of Japan, art. 34 (Upon demand of any detained person, adequate cause for detention must be immediately shown in open court in his presence and the presence of counsel.); Constitution of Korea, art. 12, sec. 6 (Any person who is arrested or detained shall have the right to request the court to review the legality of the arrest or detention.).

667/ See, e.g., International Covenant on Civil and Political Rights, art. 9(4); American Convention on Human Rights, art. 7(6); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(4).

668/ Habeas corpus protects the right to life, the right to be free from torture, and the right to be free from disappearances, among other rights. "[T]housands of forced disappearances could have been avoided in the recent past if the writ of habeas corpus had been effective ... . The writ ... is also an effective means of preventing torture ... ." Advisory Opinion OC-8/87, supra, para. 36.

669/ Id. The Special Rapporteur on states of emergency stated in his second annual report to the Sub-commission on Prevention of Discrimination and Protection of Minorities that "the most serious violations of the human rights of the detainees occur most frequently during states of emergency ... ." United Nations doc. E/CN.4/Sub.2/1988/18/Rev.1, at 1 (1988).

670/ De Wilde, Ooms and Versyp cases, 12 Series A (19 June 1971) [hereinafter the Vagrancy Cases].

671/ Id. at 41, para. 76.

672/ Id.

673/ X. v. United Kingdom, 46 Series A (5 November 1981); Weeks v. United Kingdom, 114 Series A (2 March 1987); Schiesser case, 34 Series A (4 Dec. 1979).

674/ Engle case, supra.

675/ Hurst Hannum, Materials on International Human Rights and United States Criminal Law and Procedure 54 (1989).

676/ Voulanne v. Finland, Report of the Human Rights Committee. Official Records of the General Assembly, Forty-fourth session, Supplement No. 40. (A/44/40), annex.

677/ Id.

678/ Torres v. Finland, Report of the Human Rights Committee. Official Records of the General Assembly, Forty-fifth session, Supplement No. 40. (A/45/40), vol. II, annex IX K.

679/ Ireland v. United Kingdom, 25 Series A (19 Jan. 1978); see also 19 Y.B. 512, 580 (25 Jan. 1976).

680/ X. v. Austria, 1 Strasbourg Digest of Case Law 589 (17 Mar. 1981).

681/ European Convention, article 5(4).

682/ International Covenant on Civil and Political Rights, article 9(4); American Convention, article 7(6).

683/ X. v. Federal Republic of Germany, 38 Dec. and Rep. 130 (19 July 1971).

684/ Sanchez-Reisse case, 107 Series A (21 Oct. 1986).

685/ Zamir v. United Kingdom, Report by the European Commission (11 Oct. 1983).

686/ Luberti case, 75 Series A (23 Feb. 1984).

687/ Van Droogenbroeck case, 50 Series A (24 June 1982). The European Court has also extended the requirement of periodic review to indeterminant sentences for life. See, e.g., Weeks case, 114 Series A (2 Mar. 1987); Thynne, Wilson & Gunnell case, 114 Series A (25 Oct. 1990).

688/ Engel case, supra.

689/ Christinet v. Switzerland, 17 Dec. and Rep. 35 (1 March 1979).

690/ Neumeister v. Austria. 8 Series A (27 June 1968).

691/ Torres v. Finland, supra.

692/ Dec. Adm. Com. 1983/63 IX at 286.

693/ Vuolanne v. Finland, supra.

694/ Hannum, supra, at 40.

695/ Winterwerp case, 33 Series A 23, para. 56 (24 Oct. 1979).

696/ Id. at 24, paras. 60-61.

697/ X. v. Belgium, 3 Dec. and Rep. 139 (2 Oct. 1975).

698/ X. v. United Kingdom, 46 Series A (5 Nov. 1981).

699/ Id.

700/ B. v. United Kingdom, 32 Dec. and Rep. 5 (7 Oct. 1981).

701/ Engel case, supra.

702/ Id.

703/ Id.

704/ Vagrancy cases, supra.

705/ Hannum, supra, at 50 (1989); see Ireland v. United Kingdom, 25 Series A (18 Jan. 1978).

706/ Advisory Opinion OC-8/87, supra; Advisory Opinion OC-9/87, supra.

707/ Advisory Opinion OC-8/87, supra, para. 35.

708/ Id., para. 36.

709/ Id.

710/ Id., para. 24.

711/ Id., para. 20.

712/ Id.

713/ Working Paper presented by Mr. John Carey, United Nations doc. E/CN.4/Sub.2/1991/WG.1/WP.1 at 7 (1991). Anglo-American habeas corpus procedures, however, do require that the detainee be produced before a judge. Id. Also, article 7(5) of the American Convention provides that any person detained must be brought promptly before a judge or other officer.

714/ Advisory Opinion OC-9/87, supra, para. 41.

715/ Id. para. 20 quoting Advisory Opinion OC/87, supra.

716/ Fourth annual report on states of emergency, United Nations doc. E/CN.4/Sub.2/1991/28.

717/ Id. at 43-44.

718/ Id. at 47.

719/ Id. at 39.

720/ Id. at 39-40.

721/ Report of the Working Group on Enforced or Involuntary Disappearances, United Nations doc. E/CN.4/1990/13, para. 346 (1990).

722/ Caldas v. Uruguay, Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-eighth session, Supplement No. 40 (A/38/40), annex XVIII.

723/ See, e.g., Santullo Valcada v. Uruguay, Comm. No. 9/1977, Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 40 (A/35/40), annex V; Garcia Lanza de Netto et al. v. Uruguay, Comm. No. 8/1977, id., annex VI; Grille Motte v. Uruguay, Comm. No. 11/1977, id., annex X.

724/ Advisory Opinion OC-9/87 of 6 Oct. 1987, para. 24.

725/ International Commission of Jurists, States of Emergency: Their Impact on Human Rights (1983).

726/ Joint Intervention by the International Commission of Jurists and the Federation Internationale des Droits de l'Homme, "Habeas Corpus as a Non-derogable Right", United Nations Sub-commission on Prevention and Discrimination and Protection of Minorities, forty-third session (Aug. 1991).

727/ United Nations doc. E/CN.4/1984/4 (1984).

728/ Velásqyez Rodrigues case, Judgement of 29 July 1988, 115 Series C. No. 4.

729/ Id. at 114.

730/ Human Rights Committee, Decision with Regard to Communication of Valentini de Bazzano, 19 ILM 133, 138.